TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted]

No. [redacted] 99

J. F. LAWRENCE, C. C. TAYLOR, EDWIN DABNEY, ETC., ET AL., APPELLANTS,

vs.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED MARCH 24, 1939

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 861

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INDEX

	Original	Print
Record from the district court of the United States, Northern Oklahoma	1	1
Citation and service (omitted in printing)	1	
Complaint	3	1
Motion for order requiring plaintiff to restore same conditions as existed prior to issuance of injunction	21	17
Amendment to complaint	26	21
Statement of evidence	28	22
Caption	28	22
Colloquy between court and counsel	29	23
Affidavit of E. D. Hicks, Jr.	30	27
C. C. Warren	38	28
John F. Egan	42	30
J. E. Hutchison, F. H. Shaffer, and H. L. Worman	44	31
Colloquy between court and counsel	52	35

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	Original	Print
Reporter's certificate (omitted in printing)	64	
Order directing plaintiff to make application to commission to dissolve restraining orders	65	43
Opinion per curiam	67	44
Order re motion for restitution	77	53
Supplemental complaint	79	54
Exhibit "A"—Application to the honorable corporation commission of the State of Oklahoma	80	63
Order No. 1252 of the corporation commission	103	75
Order No. 3230 of the corporation commission	104	76
Temporary restraining order, district court of the United States	105	77
Temporary injunction, district court of the United States	108	79
Order directing plaintiff to make certain application to the corporation commission of the State of Oklahoma, district court of the United States	111	81
Exhibit "B"—Objection of the complainants and others to the hearing of said application unless the St. Louis-San Francisco Railway Company purges itself of contempt by returning its shops and division point to the city of Sapulpa	113	83
Order re motion for restitution, district court of the United States	116	85
Exhibit "C"—Order sustaining objections, corporation commission	118	86
Motion to dismiss	120	88
Decree	121	88
Memorandum opinion, Van Valkenburgh, J., on motion to dismiss	126	91
Notice of appeal	144	104
Petition for appeal and order allowing same	145	105
Assignments of error	147	106
Bond on appeal (omitted in printing)	149	
Notice of praecipe	152	107
Praecipe for transcript of record	154	108
Clerk's certificate (omitted in printing)	157	
Statement of points to be relied upon and designation to print entire record	158	110

[fols. a & 1-2½] Citation, in usual form, showing service on C. B. Stuart, filed March 17, 1928, omitted in printing.

[fol. 3]

IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF OKLAHOMA

No. 207 E

St. Louis-San Francisco Railway Company, Plaintiff,

vs.

J. F. Lawrence, C. C. Taylor, Edwin Dabney, Attorney General of the State of Oklahoma; Frank C. Carter, Fred Capshaw, and C. C. Childers, Individually and as Members of the Corporation Commission of the State of Oklahoma, Defendants

Complaint—Filed Jan 11, 1927

To the Honorable Judge of the District Court of the United States for the Northern District of Oklahoma:

The St. Louis San Francisco Railway Company, plaintiff, a corporation created and organized under and by virtue of the laws of the State of Missouri, having its principal place of business at St. Louis in said State of Missouri, brings this bill of complaint against J. F. Lawrence and C. C. Taylor and Edwin Dabney, Attorney General of the State of Oklahoma, and Frank C. Carter, Fred Capshaw and C. C. Childers, individually and as members of the Corporation Commission of the State of Oklahoma, and thereupon plaintiff alleges and states:

I

That the St. Louis San Francisco Railway Company is a corporation duly organized under and by virtue of the laws of the State of Missouri, with its principal place of business in the City of St. Louis, in said State, and is a

citizen and resident of the State of Missouri, and is not a [fol. 4] citizen or resident of the State of Oklahoma, and that said railway company is authorized, as provided by law, to transact business in the State of Oklahoma; that its railroad is engaged in both intrastate and interstate commerce, and that it operates such railroad in the States of Missouri, Kansas, Arkansas, Oklahoma, Texas, Mississippi and other States, and that for many years it has owned and operated lines extending from Kansas City and St. Louis, by continuous lines, to and through the State of Oklahoma, and through the City of Sapulpa, located in said State of Oklahoma and the Northern Federal Judicial District thereof.

II

That Edwin Dabney is a citizen and resident of the State of Oklahoma and the Western Federal Judicial District thereof, and is the duly elected, qualified and acting Attorney General of the State of Oklahoma; that Frank C. Carter, Fred Capshaw and C. C. Childers are citizens and residents of the State of Oklahoma, and of the Western Federal Judicial District thereof, and are the duly elected, qualified and acting members of the Corporation Commission of the State of Oklahoma; that J. F. Lawrence and C. C. Taylor are citizens and residents of the State of Oklahoma and the Northern Federal Judicial District thereof, living in the said City of Sapulpa in said Northern Federal Judicial District.

III

That the matter in controversy herein exceeds, exclusive of interest and costs, the sum or value of $3,000.00, and that plaintiff's cause of action as hereinafter shown arises under the Constitution and laws of the United States, and especially under Section 8, Article I of said Constitution, which provides in substance that the Congress of the United States shall have power to regulate commerce among the several states, and under the Fourteenth Amendment to said Constitution, which provides that no state shall deprive any person of his property without due process of law nor deny that person the equal protection of the laws.

[fol. 5] IV

That during the month of February, 1917, defendants, J. F. Lawrence and C. C. Taylor, appearing on behalf of themselves, the Chamber of Commerce of the City of Sapulpa, and the citizens of said City of Sapula, filed complaint with the Corporation Commission of the State of Oklahoma, which had for its purpose the prevention of this plaintiff from moving its said shops and division point from the City of Sapupla to the City of Tulsa on its said line of railroad; that thereafter and on the 15th day of February, 1917, Order No. 1232 was issued by the Corporation Commission of the State of Oklahoma, temporarily restraining plaintiff from moving its said shops or division point from the City of Sapulpa to the City of Tulsa, or doing any act relative thereto; that on the 29th day of December, 1926, upon application of said defendants, J. F. Lawrence and C. C. Taylor, appearing for themselves and for the Chamber of Commerce of the City of Sapulpa and for the citizens of said City, the Corporation Commission of the State of Oklahoma made and caused to be served upon this plaintiff Order No. 3029, which reads as follows:

"This cause coming on to be heard on this 29th day of December, 1926, upon motion of the complainants, and it appearing that the defendant is taking steps toward the removal of its shops and division point from the City of Sapulpa in violation of the order of this Commission entered on the 5th day of February, 1917, and in violation of the Act of the Legislature passed in 1917, it is ordered by the Commission that said cause be set down for hearing on the 17th day of January, 1927, and that in the meantime, and until the further order of the Commission, the defendant be, and it is hereby prohibited from moving its shops or division point from the City of Sapulpa, from changing the runs of either its passenger or freight trains, or from taking any other steps towards changing its division point for either passenger or freight service from the said City of Sapulpa.

"It is further ordered that a copy of this order be served on the defendant.

"Done at Oklahoma City, Oklahoma, on the date first above named."

That a hearing on said complaint filed by said defendants as set forth in said order, is set before the Corporation Commission of the State of Oklahoma for the 17th day of January, 1927.

[fol. 6] V

That the Statute of the State of Oklahoma referred to in the above named order as "the Act of the Legislature passed in 1917", and all the Statutes of the State of Oklahoma relied upon by said defendants for the jurisdiction of said Corporation Commission in said action, are contained in Compiled Oklahoma Statutes, 1921, as follows:

"3482. Removal—Permit.—That no person, receiver, firm, company or corporation owning, operating or managing any line of steam railroad in this State shall be allowed to remove railroad shops or division points which have been located at any place in this State for a period of not less than five years without previously securing the permission of the Corporation Commission to make such removal.

"3483. Corporation Commission—Jurisdiction.—If, and when any such person, receiver, firm, company or corporation desires to remove any such railroad shops or division point described in Section One of this act, it shall be his duty to file an application with the Corporation Commission setting forth the present location of such shops or division point and the reasons for such removal, and thereupon the Corporation Commission shall have full power and jurisdiction to entertain such complaint, but before hearing the same or making any order permitting such removal to be made, said cause shall be set down for hearing, not less than ten days' notice shall be given the city, town or village in which or at which such shops or division point have been maintained and after giving all parties interested a full and complete hearing in the premises the Commission may in its discretion permit or refuse such request for a removal.

"3484. Hearing Before Corporation Commission.—When an application is filed before the Commission for the removal of terminals or car shops, as provided in Section Two the Commission shall hear evidence on the relative efficiency and expense of handling traffic through the pro-

posed terminal as compared with the present facilities, and shall consider all other facts and circumstances affecting the various interests involved. In determining the adequacy of the present facilities the Commission shall consider the same increased by an expenditure equal to an amount necessary to remove the same to the proposed location or an amount equal to the necessary expenditure to establish such facilities at the new location. It is hereby further provided that the Commission shall hear evidence and shall make a finding of fact as to the sanitary and habitable conditions of the proposed location with reference to whether the same would endanger the health of the employees of the applicant or the health of their families. If the Commission should find that the sanitary or habitable conditions at the proposed location of said terminal facilities would endanger or injuriously affect the health of the employees of said applicant or their families, the Commission shall deny said application and order the said terminal facilities and car shops to remain at the present location.

[fol. 7] "3485. Proof—Burden Upon Applicant.—On any such hearing, as provided in this act, the presumption shall be against the removal, and the burden of proof rest upon the applicant to show that such removal ought to be made.

"3548. Transportation Companies Must Maintain Repair Shops in State.—Transportation companies operating within this State which now have in existence roundhouses or machine shops for the repairing of locomotives, engines, and cars, or which may hereafter establish such roundhouses or machine shops for such purpose, shall hereafter maintain such shops and round houses with sufficient equipment and employees to keep in proper repair all rolling stock, locomotives, engines, and cars used within this State in the transportation of passengers and freight and such transportation companies shall hereafter cause all such rolling stock, locomotives, engines and cars to be repaired at such shops or round houses and kept in a safe and serviceable condition and no such repairs shall be done outside the State of Oklahoma, if such repairs can be done at such company's shops within this State."

VI

Premises considered, plaintiff complains of such jurisdiction and injunctive action on the part of said Corporation Commission, because the foregoing Statutes upon which the Commission seeks to base its jurisdiction are unconstitutional and void, and said Commission therefore is without power to act under said Statutes, in that they are not a proper exercise of the police power of the State and deprive plaintiff of due process of law and of equal protection under the law, as guaranteed by the Fourteenth Amendment to the Constitution of the United States. Plaintiff shows to the court that such Statutes are arbitrary, unreasonable and unnecessary, because neither the shipping public, the traveling public nor the public at large has any interest in the place where railroad shops or division points shall be located on said railway company's lines; that the location of said shops or division point does not serve to protect the public morals, the public safety or the public health, and the right of the State of Oklahoma to enact such Statutes cannot be traced or referred to any legitimate or well known source of police power. Such Statutes are arbitrary, unreasonable and unnecessary, and are an undue [fol. 8] and unconstitutional interference with the right of a railway company to manage its property and operate it for the best interests of the public and the stockholders of such company, and to operate the same economically, which, by law, it is required to do, and at the least expense necessary to serve the public, and are, therefore, an invasion of the rights of such company prohibited by law and the Constitution of the United States as aforesaid.

VII

That said Statutes are unconstitutional for the further reason that said sections show on their faces that they were enacted purely to serve local interests and not to serve the public, and this regardless of whether they injuriously affect the property of the railway company and interfere directly with interstate commerce.

VIII

Plaintiff says that said sections of the Statutes, taken together, declare that if division points or shops have been located in any particular place in the State of Oklahoma for a period of five years, the presumption against the right of removal shall obtain against the railway, and that the burden of proof shall be upon the railway. Plaintiff says that such provision in such sections is unconstitutional in that it is an arbitrary exercise of police power; that the five-year period as announced in said provision has no just relation to the proposition as to whether the right of removal exists and that the change in the rules of evidence by virtue of said five year period, is unconstitutional, in that it deprives the plaintiff of its property without due process of law and of the equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States. Plaintiff, therefore, alleges that the Corporation Commission aforesaid has no power or jurisdiction to act in the premises under said unconstitutional Statutes, nor to issue its injunctive process against this plaintiff prohibiting it from removing its shops, division point and appurtenances thereto from the said City of [fol. 9] Sapulpa, without obtaining the consent of such Commission.

IX

Plaintiff further says that said Statutes are unconstitutional, void and of no effect for the reason that same purport to grant to the Corporation Commission authority to decide questions relative to, and to directly regulate, interstate commerce, and that if said Corporation Commission is given such authority by said Statutes in said proceedings pending before said Commission, such decision will, in effect, regulate the interstate commerce business of this plaintiff.

X

Plaintiff further shows to the court that said Statutes are unconstitutional, void and of no effect in so far as same are applicable to said purported action pending before the Corporation Commission of the State of Oklahoma, for the reason that the question as to whether or not plaintiff be

permitted to remove its shops and division point to the City of Tulsa, or be compelled to continue said shops and division point at the City of Sapulpa, is, by reason of the facts hereinbefore related, one directly affecting interstate commerce, and a decision of said question by said Corporation Commission will be a direct regulation of interstate commerce, and if said removal is prevented by the order of said Corporation Commission, then said order will be a direct burden upon and a direct regulation of and interference with interstate commerce.

XI

That on or about the 1st day of January, 1927, plaintiff prepared and published its train schedule, changing the run of certain of its interstate passenger trains operated by defendant for the purpose of carrying interstate passengers, interstate express and interstate United States mail, by providing therein that said trains run from Oklahoma City to Tulsa and change crews at Tulsa, and from Fort Scott, Kansas, to Tulsa, and change crews at Tulsa, and from Monett, Missouri, to Tulsa, and change crews at Tulsa; that said schedule was prepared and published by [fol. 16] plaintiff after mature study and deliberation in an effort to promote, change and regulate its interstate commerce business. Plaintiff says that said schedule, if put into effect, will greatly facilitate and promote the interstate commerce business transacted by plaintiff; that owing to the increase in business transported over plaintiff's line of railroad and the recent change in the equipment and motive power used by plaintiff and the improvement thereof, and owing to a general scheme recently adopted by plaintiff with relation to its interstate commerce business involving changes in the location and even the elimination of various division points throughout plaintiff's system of railway in the States of Missouri, Kansas, Oklahoma, Texas and other States, it has become necessary and imperative to the proper conduct of plaintiff's interstate business that said changes in said runs be made; that the order of the Corporation Commission hereinafter referred to prevents plaintiff from putting into effect its said schedule with reference to its said interstate trains, and is a construction

by the Corporation Commission of the above named Statutes to the effect that said Statutes grant to said Commission the power and duty to regulate interstate commerce.

XII

Plaintiff says that the restraining orders heretofore issued by said Corporation Commission as hereinbefore set forth are void and of no effect for the reason that said orders attempt to regulate and interfere, and do regulate and interfere with the running of interstate trains; that said orders interfere with this plaintiff materially in the management and operation of its said interstate trains, and are unreasonable, unnecessary and constitute a burden upon interstate commerce and are unconstitutional and void.

XIII

Plaintiff would further show to the court that the above named Statutes as construed by the Corporation Commission of the State of Oklahoma, in their application to the questions herein involved, are unconstitutional, confiscatory [fol. 11] and void by reason of the particular facts applicable to this case. In this connection plaintiff would show to the court, as follows:

(a) That more than thirty years ago the St. Louis & San Francisco Railroad Company built and acquired lines of railroad extending from the cities of St. Louis and Kansas City to Afton, Oklahoma, at which point said lines of railroad united and extended in a single line in a southwesterly direction into the State of Oklahoma and the cities of Tulsa and Sapulpa in said State, and thereafter built lines of railroad extending south from the said City of Sapulpa into the State of Texas to the City of Sherman in said State, and a line of railroad extending west from said City of Sapulpa, through Oklahoma City, Lawton and to the City of Quanah in the State of Texas; that owing to the character of the roadbed constructed by said railroad company and the character of motive power and equipment at said time necessarily used by said railroad company, it became and was necessary and convenient in the transaction of the business of said railroad company that

division points be located on said railroad at a distance of not to exceed one hundred miles from each other; that owing to the relative size of the different cities through which said lines of railroad passed, and owing to the fact that at the times of the construction of said lines of railroad as heretofore described, said railroad company received a large volume of its business from the vicinity of the City of Sapulpa, and owing to the further fact that it appeared to those having to do with the construction of said lines of railroad at said times that the City of Sapulpa would become the business shipping center of its locality, said railroad company located, built and constructed at the said City of Sapulpa certain railroad shops and a division point on said lines of railroad, and that said shops and division point have since been maintained and operated at the said City of Sapulpa.

(b) That heretofore and on the 1st day of November, 1916, this plaintiff became the owner by purchase of the above named lines of railroad and railroad shops and has since owned and operated same.

[fol. 12] (c) That although from the conditions existing at the time of the construction of said lines of railroad it appeared to those having to do with the construction of same that it would be to the best interest of said railroad and the shipping public that certain railroad shops used in connection with said lines of railroad and a division point thereon be located at the City of Sapulpa, and that the City of Tulsa would be of minor importance as a railroad and shipping center, conditions have so changed as to make it imperative on the part of the operators of said lines of railroad to locate extensive shops and yards at the City of Tulsa, and at a point therein known as West Tulsa, and to move said division point from the City of Sapulpa to the said City of Tulsa; that at the time of the construction of said lines of railroad, the City of Tulsa was comparatively small, and it appeared to those constructing said lines of railroad that the City of Sapulpa would develop into a large city and an important shipping center, and that Tulsa would remain a comparatively small town and its shipping interests would be of minor importance, but notwithstanding said appearances, the City of

Tulsa has developed into a city of approximately 125,000 inhabitants, and has become one of the largest, if not the largest, shipping centers in the State of Oklahoma; that plaintiff now owns and operates and has for many years owned and operated a line of railroad extending in a northwesterly direction from said City of Tulsa through the cities of Pawnee, Perry and Enid, and that said line of railroad has for many years brought a great volume of freight and passenger business into the said City of Tulsa; that immense oil fields and oil properties have been developed and constructed and are being operated in the vicinity of and in all directions from the said City of Tulsa, and the said City of Tulsa has become the center of said operations; that other industries, transacting great volumes of business, have been located and are now being operated in the said City of Tulsa and in the vicinity thereof, and that said industries use the said City of Tulsa as their shipping center; that the City of Sapulpa has developed only to a very minor degree; that the population of said City at this time [fol. 13] is approximately 20,000 people; that very few of the industries operated as hereinbefore set forth, use the City of Sapulpa or the terminals of said lines of railroad located thereat as a shipping center.

(d) That at the time of the location of said shops and division point heretofore described at the said City of Sapulpa, it appeared to those having to do with the construction and operation of said lines of railroad at said times, that the topography of the ground in the vicinity of said yards and said shops would permit the location and construction thereat of sufficient facilities for the transaction of all shipping business necessary to be transacted at the shops and division point located in that vicinity, but plaintiff shows to the court that owing to the great increase in the volume of business which must be transacted at the shops and division point located in said vicinity, and owing to the fact that the shops and yards as now located at said City of Sapulpa are hemmed in by the business houses of the City of Sapulpa on the south of said yards and shops, and by a great hill immediately adjacent to said shops and said yards on the north thereof, and owing to the further fact that said shops and said yards are located on a decided

curve in the right of way of plaintiff at said point, it has been and will continue to be impossible for this plaintiff to construct at said point sufficient shops and yards to transact the business necessary to be transacted at the division point shops and yards which must be located in said vicinity or at or in the vicinity of the City of Tulsa.

(e) That at the time of the construction of said railroad lines as hereinbefore set forth, owing to the condition of the roadbed, the character of the motive power, engines and other equipment, it was necessary for the proper conduct of the business transacted by said railroad company to locate division points and large shops at points not to exceed one hundred miles from each other, but in recent years the condition of the roadbed, bridges, etc., has been improved to such an extent, the motive power used by those operating said lines of railroad has been increased to such [fol. 14] an extent, the engines and other equipment used in the transaction of said business have been enlarged to such an extent that at this time it is necessary to the proper conduct of said business to increase the distances between the division points and large shops, and it has become and is necessary to remodel the plans of operation of said railroad lines, in that the division points and shops be located much farther apart, and that longer runs be made by crews in charge of said railway company's trains; that in carrying out this necessary scheme, it is necessary to locate the shops and division point to be located in the vicinity of Sapulpa and Tulsa, at the City of Tulsa.

(f) That this plaintiff is now and has been at all times mentioned in this complaint engaged extensively in interstate commerce; that all trains running through the yards and division point described herein are engaged in interstate commerce; that both the switch and road engines used by plaintiff in and through said yards and shops are constantly engaged in interstate commerce; that there is seldom a train movement made in the vicinity of said shops that has not for its purpose the furtherance of plaintiff's interstate commerce business; that a large proportion of the shipments hereinbefore mentioned originating at and passing through the City of Tulsa, are shipments destined to points outside the State of Oklahoma, or shipments passing through the State of Oklahoma, or shipments from

points outside the State of Oklahoma, destined to points within the State of Oklahoma; that plaintiff with its said lines of railroad is engaged in an extensive interstate railroad business, carrying a large volume of commerce, both freight and passenger, from Kansas City, Missouri, and points north and east, to Tulsa and other points within the State of Oklahoma, and to points south in the State of Texas, and from St. Louis, Missouri, and points north, east and south to Tulsa, and other points within the State of Oklahoma, and points in other states to the south; that the facilities and equipment constituting the shops and division point herein described, are necessary and imperative to the transaction of said interstate business, and are now being and have for a long time been used extensively [fol. 15] in the carrying on of said business.

(g) That those of plaintiff's officers and managers having to do with the management of its business, have, after mature consideration and deliberation, decided that it is to the best interest of the shipping public, passengers, and those having business with said railway company, and to the best interest of plaintiff that its railway shops and division point now located at the City of Sapulpa, be moved therefrom to the City of Tulsa and located therein at a point commonly known as West Tulsa and consolidated with the shops and yards now located at said point, and that such removal will greatly promote, accommodate and aid plaintiff's interstate commerce business; that as a result of its declaration of its intention to remove its said shops and division point, the actions on the part of defendants hereinafter complained of, were taken.

(h) That a removal of its shops and division point from Sapulpa to Tulsa, a distance of about eighteen miles and a consolidation of said shops with the shops now located at the City of Tulsa, as hereinbefore described, will enable plaintiff to promote and aid its interstate commerce business by eliminating annually hundreds of thousands of dollars of operating expense; that among many other items, plaintiff, if permitted to execute its said plan of removal, will be able to save in wages of employes approximately $200,000.00, per annum; in operating material and equipment, approximately $70,000.00 per annum; in fuel, power and lights, approximately $25,000.00 per annum; that owing

to the fact that it has been necessary for plaintiff to construct and maintain extensive shops and yards at Tulsa in addition to the shops and yards at Sapulpa, if plaintiff is prevented from removing its said shops from Sapulpa to Tulsa, it will be necessary for plaintiff to maintain and operate, at a great expense and loss to its stockholders, two extensive sets of shops and yards within eighteen miles of each other, thus entailing great additional and needless cost and expense, resulting in great confusion and con- [fol. 16] gestion of traffic causing loss of time to shipments, and thus interfering with and placing a direct burden upon plaintiff's interstate commerce business.

(i) That in the proper conduct and operation of its railroad, it becomes necessary from time to time for plaintiff to readjust its division points and to find better and more efficient, suitable and convenient places for repair work and for keeping its rolling stock and other instrumentalities of its railway used in interstate commerce in proper condition, and that those matters are purely managerial and necessary to be confined to such railway company the better to serve the public and its stockholders and those who invested large sums of money in said railway.

XIV

By reason of the foregoing facts plaintiff says that said Statutes in so far as they have been construed and made applicable to the conditions described herein, are unconstitutional, confiscatory, arbitrary, unnecessary and void in that they, as applied to said conditions and construed by said Commission, grant to said Commission authority, to issue orders and decide questions directly regulating, affecting and constituting a burden on interstate commerce; that the question as to whether or not this plaintiff be permitted to remove its division point and shops from Sapulpa to Tulsa is one vitally and materially affecting the extensive interstate commerce business of plaintiff; that the orders of said Corporation Commission heretofore issued as hereinbefore set forth constitute a direct interference with, a regulation of, and burden upon plaintiff's interstate commerce business; that the orders that said Corporation Commission will necessarily issue as a result of said proceed-

ings and as a result of its construction of said Statutes, will constitute a regulation of and interference with, and a burden upon plaintiff's interestate commerce business.

XV

Plaintiff states that to require it, under the conditions as herein described, to continue its division point and shops at the City of Sapulpa, and to prevent it from removing its [fol. 17] said shops from the City of Sapulpa to the City of Tulsa and consolidating the two at said last named City, would cause a great and irreparable loss to plaintiff and its stockholders, and place a direct burden upon interstate commerce, and make it impossible for plaintiff to comply with the Act of Congress known as the Transportation Act, requiring it to economically opetrate its property; that it would cause such needless expenditure of large sums of money as to amount to a deprivation and taking of property from plaintiff without due process of law, forbidden by the Fourteenth Amendment to the Constitution of the United States.

XVI

Plaintiff says that unless it submits to the jurisdiction assumed by the Corporation Commission by reason of the above named Statutes as construed by said Commission, and obeys the injunctive process issued against it by said Commission as aforesaid, it will be burdened and harrassed with numerous suits for penalties for its failure to so submit to such jurisdiction, and will entail great and irreparable damage; that unless restrained defendants, J. F. Lawrence and C. C. Taylor, will appear before said Corporation Commission on the said 17th day of January, 1927, with sundry witnessess and will procure an order from said Commission preventing the removal of plaintiff's shops and division point as herein described until the above named Statutes are complied with by plaintiff, and unless restrained said Corporation Commission of the State of Oklahoma, composed of defendants, Frank C. Carter, Fred Capshaw and C. C. Childers, will on said day, or at some future date to which said action is continued, take jurisdiction of said action and hearing and will, at the conclusion of said hearing, issue its order permanently prohibiting

and enjoining plaintiff from so removing its said shops and division point until plaintiff has complied with the above named Statutes, and unless restrained and enjoined, defendant, Edwin Dabney, Attorney General of the State of Okla- [fol. 18] homa, will, at said hearing and at future hearings and times, attempt to enforce said Statutes and the orders of said Corporation Commission based thereon, thus harrassing and injuring plaintiff to its great damage; that unless restrained said defendants, and all of them, will enforce the temporary restraining order so issued by said Corporation Commission as herein set forth, and prevent plaintiff from putting into effect its schedule regulating its interstate trains as herein set forth and described; that the effect of said actions on the part of said defendants will interfere with the management and operation of plaintiff's interstate commerce business to such an extent as to cause plaintiff great immediate and irreparable damage. Plaintiff says that as the effect of the action of said defendants is to interfere immediately with the management of its interstate business and the control of its interstate trains, that the danger of said damage to plaintiff's business as herein described so caused by the actions of defendants as herein set forth, is imminent, and in order to preserve plaintiff's business and plaintiff's management thereof, a temporary restraining order by this Honorable Court is necessary. Plaintiff says that it has no adequate remedy at law.

Wherefore, and for as much as plaintiff is without remedy in the premises, according to the common law, and remediable only in equity, and to the end that plaintiff may not be subjected to suits for penalties and a multiplicity of suits which will otherwise result, and will not suffer irreparable injury and damage which must result if plaintiff refuses to submit to the jurisdiction of said Corporation Commission, and to the end that plaintiff may be permitted to pursue and carry on its business without unlawful hindrance or obstruction, plaintiff prays that a writ of subpena be issued against the defendants, and that each and every one of them named and described be ordered to appear and fully submit and make answer to this bill of complaint, but not under oath, answer under oath being expressly waived, and that said defendants, and each of

them, their agents, servants and employes, and all other [fol. 19] persons acting under or through their authority, or authority of their officers and all other persons similarly situated, respectively, be enjoined by final decree, and in the meanwhile by preliminary injunction, from compelling plaintiff to submit to the jurisdiction of the Corporation Commission in the several matters aforesaid, and plaintiff prays that in the meantime a temporary restraining order be issued in accordance with its plea for preliminary injunction, and in order that said plaintiff may not suffer the irreparable injury and damage that it otherwise will and must suffer as is alleged and charged in said bill of complaint.

Stuart, Cruce & Franklin, Attorneys for Plaintiff.

[fol. 20] *Duly sworn to by Ben Franklin. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 21] In United States Circuit Court

[Title omitted]

Motion for Order Requiring Plaintiff to Restore Same Conditions as Existed Prior to Issuance of Injunction —Filed June 25, 1927

Come now, J. F. Lawrence, C. C. Taylor and Edwin Dabney, Attorney General of the State of Oklahoma, defendants in said cause, and respectfully show to the Court that on the 19th day of January, 1927, there was issued in this cause a temporary injunction restraining these defendants, and all persons similarly situated, from prosecuting the hearing before the Corporation Commission of Oklahoma, and restraining the Corporation Commission from permitting the prosecution of the hearing wherein was involved the right of the plaintiff to move its Division point and Shops from the City of Sapulpa to West Tulsa, Oklahoma, all of which appears more fully from the decree on file in this cause to which reference is made. That for many years prior to the entry of said decree the plaintiff had main-

tained a Division point and Shops at the City of Sapulpa where it employed approximately Seven Hundred men, who with their families resided in Sapulpa, and constituted an important and essential part of its population and business life; that immediately after the issuance of said temporary injunction, the defendants in said cause appealed to the Supreme Court of the United States; that with the utmost expedition they expedited their appeal; that they filed a motion to advance the cause; that the court granted this [fol. 22] motion and set the cause down for hearing on the 18th day of April, 1927, and that court expedited its decision in said cause handing down its opinion on the 31st day of May, 1927, which reversed the decree of this court granting the interlocutory injunction. Notwithstanding the fact that the plaintiff at all times knew that the appeal was being prosecuted, and prosecuted with the utmost speed and that a decision would be reached promptly in the Supreme Court of the United States, it immediately after securing a temporary injunction hurriedly moved its Shops and Division point from Sapulpa to West Tulsa, and that it has now removed all the machinery from its shops buildings; that it has closed said buildings; that it has moved all its switch engines from Sapulpa to West Tulsa except one left for local industrial use; that it has taken up several of its tracks and was engaged in taking up additional tracks when the decision of the Supreme Court was announced, at which time it discontinued further track removal; that it has changed the runs of its passenger trains which formerly terminated at Sapulpa; that it has discontinued the use of Sapulpa as a division point for freight trains, all of such trains now running into West Tulsa so that even freight destined from Oklahoma City to Sapulpa runs through Sapulpa to West Tulsa and is moved back to Sapulpa, involving a loss of two or three days; that said plaintiff taking advantage of said temporary injunction and completely ignoring the statute of Oklahoma and the orders of the Corporation Commission, has perfected the removal of its shops and division point from Sapulpa to West Tulsa.

These defendants further allege that on the 5th day of February, 1917, said defendants Lawrence and Taylor, filed a complaint in the office of the Corporation Commission of Oklahoma seeking to prevent the plaintiff in this case from [fol. 23] removing its shops and division point from

Sapulpa to West Tulsa; that on said day the Corporation Commission of Oklahoma entered an order in said cause setting said cause down for hearing and prohibiting the plaintiff from moving its shops and division point until the further order of the Commission; that that order has been in effect continuously since said time and is now in effect; that on the 29th day of December, 1926 the said Lawrence and Taylor filed a motion in said cause pending in the Corporation Commission setting up that the plaintiff in this cause, notwithstanding said order of the Commission, and notwithstanding the act passed by the Legislature in 1917, was about to move its shops and division point from Sapulpa to West Tulsa and praying an order preventing said removal; that the Corporation Commission issued an order on said 29th day of December, 1926, setting said cause for hearing on the 17th day of January, 1927, and directed that in the meantime and until the further order of the Commission defendant be prohibited from moving its shops and division point from the City of Sapulpa. All of the proceedings before the Corporation Commission are set out in full in the affidavit filed in this cause by Messrs. Fred Capshaw, Frank C. Carter and C. C. Childers, in objecting to the prayer of the plaintiff for an interlocutory injunction except the order made by the Corporation Commission of the 29th day of December, 1926, and a copy of that order is set out in the plaintiff's bill of complaint. These defendants now refer to the said affidavit and the said order of December 29, 1926 now on file in this cause as a part of this motion.

These defendants further show to the court that the opinion of the Supreme Court of the United States entered on May 31, 1927 reverses the decree of this court granting a temporary injunction, and holds that no such injunction should have issued.

These defendants further show to the court that the act [fol. 24] of the Oklahoma Legislature of 1917 (Secs. 3,482 to 3,485, both inclusive, Compiled Statute 1921) prohibits railway companies from removing their shops and division points which had been located for as much as five years, without previously applying to the Corporation Commission and obtaining an order therefor; that the shops and division point herein involved have been located at Sapulpa for approximately thirty five years; that the plaintiff has

not applied to the Corporation Commission pursuant to the act of 1917 aforesaid; that this act contains no penal clauses and does not by its own terms provide a remedy against a railway company which disobeys it, and does not by its terms confer jurisdiction on the Corporation Commission to require a railway company which has disobeyed the act to restore the status quo.

These defendants, therefore, show to the court that the plaintiff in this case has violated the expressed prohibition of the aforesaid statute of the State; has ignored and disobeyed the temporary orders issued by the Corporation Commission hereinbefore recited, and has moved its shops and division point from Sapulpa to West Tulsa at a time when these defendants and all persons similarly situated were prevented of taking any action by the interlocutory injunction issued by this court, and which the Supreme Court of the United States has held should not have been issued.

Unless, therefore, the plaintiff is required to restore the status quo existing prior to the issuance of the interlocutory injunction the citizens of Sapulpa, the employees of the railway company and these defendants will suffer great and irreparable injury.

Wherefore, these defendants move the court to make an order in this cause requiring the plaintiff to restore the same conditions with respect to its shops and division point as existed prior to the 17th day of January, 1927; that it be required to re-build its trackage at Sapulpa as such trackage then existed; to return to Sapulpa all machinery [fol. 25] and employees which have been removed by reason of said interlocutory injunction; to restore the runs of its trains and particularly its freight trains so that Sapulpa will be the division point for said runs as it was before the issuance of said interlocutory injunction, and that in general terms the plaintiff in this cause be required to restore the status quo so as to replace the parties in exactly the same positions they would have occupied had the interlocutory injunction not issued.

Edwin Dabney, Attorney General, C. B. Ames, T. L. Blakemore, Attorneys for said Defendants. Ames, Lowe & Cochran, of Counsel.

[File endorsement omitted.]

[fol. 26] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDMENT TO COMPLAINT—Filed Oct. 22, 1927

Comes now the St. Louis San Francisco Railway Company, plaintiff above named, and after leave of court having been first had and obtained, files this its amendment to the original complaint filed herein.

Plaintiff further prays that said defendants, and each and every one of them named and described herein, and all persons for whom said defendants appear in said above described cause, and all persons whomsoever, acting under or by the authority of said defendants, or any of them, be further restrained and enjoined from prosecuting, hearing, conducting or permitting a hearing to be had, or taking or permitting any further proceedings to be had in the above described cause of action now pending before the Corporation Commission, or from making, promulgating or enforcing, or causing to be made, promulgated or enforced ony [fol. 27] order prohibiting the above named plaintiff from removing any of its shops or appurtenances thereto, or its division point or any part thereof, from the City of Sapulpa to the City of Tulsa, and that they be further restrained from doing any act having for its purpose to prevent the changing of the run of any of plaintiff's passenger trains so that the crews thereon may change at the City of Tulsa, instead of the City of Sapulpa, or from doing any act which has for its purpose the prevention of said plaintiff from removing its shops or division point from the City of Sapulpa to the City of Tulsa, or from doing any act which has for its purpose the prevention of said plaintiff from retaining its said shops or division point, or any part of either of them, at the City of Tulsa, instead of the City of Sapulpa, or from doing any act which, in any manner, interferes with the plaintiff in maintaining its said shops and its said division point at the City of Tulsa.

Plaintiff further prays that upon final hearing of this cause that said defendants, and all of them, and all persons for whom any of said defendants appear in this cause, and the agents, servants and representatives of said defend-

ants, or any such persons, be permanently enjoined from doing any of said acts as above described.

Plaintiff further prays that it be granted such other relief, either general or special, to which, in good conscience and equity, it may be shown to be entitled in the premises.

E. T. Miller, C. B. Stuart, Cruce & Franklin, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 28] In United States District Court

[Title omitted]

Statement of Evidence Filed March 14, 1928

Caption

Be it remembered that heretofore, to wit, on the 22nd day of October, 1927, before the Honorable Arba S. Van Valkenburgh, Circuit Judge, Honorable Arthur L. Reeves, District Judge, and Honorable F. E. Kenamer, District Judge, the above entitled cause came on for hearing upon the motions filed herein.

Appearances: Messrs. C. B. Stuart and Ben Franklin appeared for the plaintiff; Messrs. C. B. Ames and T. L. Blakemore appeared for defendants Lawrence and Taylor.

Thereupon the following proceedings were had, to wit:

[fol. 29] Colloquy Between Court and Counsel

Judge Van Valkenburgh: It is the understanding of the Court that the case of St. Louis-San Francisco Railway Company against Lawrence stands for final hearing. Are counsel ready in this case?

Mr. Ames: That is not the case. The case is not here for final hearing at all, but is here on two motions, one to require the Railroad Company to make restitution of the wrong that it did under the direction of an erroneous order it had made by this Court, and the other for ascertainment and allowance of damages under the injunction bond because the temporary injunction was wrongfully obtained.

Judge Van Valkenburgh: The Court has had these motions before it and holds that neither of those motions should be considered nor granted until the result of the case on final hearing.

Mr. Ames: Is your Honor going to decide the case without giving us an opportunity to present it?

Judge Van Valkenburgh: On those motions?

Mr. Ames: On the motions we desire to present.

Judge Van Valkenburgh: You may present them, but we have had your motion before us and it is unimportant to the matter of final hearing whether the assessment of damages is heard at this time; furthermore, the Court would not make any order to send the shops back and perhaps go to an unnecessary expense in the matter until it determines whether on final hearing that should be done. This does not foreclose——

[fol. 30] Mr. Ames: We present a motion——

Judge Van Valkenburgh: Just a moment. This does not foreclose any right you have, because the question on final hearing of whether the shops ought to be removed would necessarily settle the question whether it should be sent back now.

Mr. Ames: The matter is not here for final hearing; the defendants are not ready to present it on final hearing, and I take it that the case will not be considered for a year or more.

Judge Van Valkenburgh: Why?

Mr. Ames: Because there are a number of steps which must be taken before this case can be presented finally, under the decision of the Supreme Court of the United States. It is the duty of the Railroad Company to comply with the laws of the United States.

Judge Van Valkenburgh: The Court will hear you on these motions, of course. That is all.

Mr. Ames: The first thing——

Mr. Franklin: We agree with counsel, your Honors, that the case is not up on final hearing at this time.

Judge Van Valkenburgh: You say it is not?

Mr. Franklin: It is not.

Judge Van Valkenburgh: Very well.

Mr. Franklin: There is a motion to dismiss the bill for lack of equity, that I understand Judge Ames will with-

draw. That being true, the issues are not joined. What I [fol. 31] do not agree with the Judge is——

Judge Kennamer: My understanding is that it stands for hearing on your motion.

Mr. Franklin: I understand that he will not present that motion. Judge Ames wrote me to that effect, then the only thing that would follow would be an answer and the matter come up on final hearing.

Judge Van Valkenburgh: Very well, speaking for myself, the Court was not advised that the issues were not made for final hearing at this time. If that is not true, certainly, we will hear the other matters.

Mr. Ames: The first thing we wish to present, if your Honors please, is an objection to this motion being heard by three judges. We wish to file and present, if your Honors please, that motion.

(Thereupon Mr. Ames read to the Court his motion, and after argument and presentation by counsel for both sides, the following proceedings were had:)

Judge Van Valkenburgh: Gentlemen, the Court has given full consideration to the arguments of counsel and has inspected the opinion and we have reached the conclusion that the spirit, purpose, and intent of the law was that after the jurisdiction of the three judges had attached, and they granted the temporary order, that that jurisdiction as to [fol. 32] all matters affecting the substantive relief, or for all relief to be granted, should still remain in a three judge court, and decide the ultimate merits. Our judgment is that this question of restitution is so inseparably and inextricably interwoven here that the ultimate question of whether the permanent injunction should issue or be denied, that a three judge court—when I say three judges I do not necessarily mean the court as at present constituted—cannot refuse to accept the burden and responsibility which the law imposes upon it. For that reason the application that it should be heard to the district judge will be overruled, and jurisdiction of the three judge court will be retained.

Now, as to the other matter of damages, it is the judgment of the Court that that is a matter that has no relationship whatever to the question of whether an ultimate,

permanent injunction shall or shall not be granted. It depends upon what damages have accrued, if any, on account of what the Supreme Court has said to be the improvident issuing of the temporary injunction.

There is no connection whatever with any ultimate relief that can be granted, consequently we believe that that is a matter to be handled by the district court and the district judge at such time and place, and under such circumstances and conditions as he may think appropriate in connection with the other situation of the case.

Now, is there any other matter to come before the judges [fol. 33] sitting as three judges?

Mr. Ames: May it please your Honors, I would like to present a motion addressed to Judge Kennamer only, for the purpose of making our record. I have not prepared it, but if Judge Kennamer will permit it, I will dictate it and it can be transcribed by the reporter and signed and filed as though presented.

Judge Kennamer: Yes, sir.

Judge Van Valkenburgh: Anything will be permitted to let you make any record you desire to review the action of the Court.

Mr. Ames: To the Honorable F. E. Kennamer, United States District Judge: The defendants in said cause respectfully request your Honor, sitting alone, to hear their application for an order of Court requiring the plaintiff in said cause to restore the status quo as in respect of the shops and division point at Sapulpa as it existed on and prior to the date on which the interlocutory injunction was issued by this Court.

Judge Kennamer: I overrule the motion and allow exception.

Mr. Ames: Mr. Reporter, will you write that motion up and attach to the bottom of the motion on the same sheet the following:

The above motion being presented to the Honorable F. E. Kennamer on this date, is overruled.

[fol. 34] Judge Kennamer: Yes, sir, that is all right.

Mr. Ames: Now, may it please your Honors, we wish to present our motion.

Judge Van Valkenburgh: What motion is that?

Mr. Ames: Motion to require restitution.

Judge Van Valkenburgh: I thought you had already presented it.

Mr. Ames: Oh, no, we haven't presented it at all.

Judge Van Valkenburgh: You are presenting it to us?

Judge Kennamer: You mean the motion to restore status quo?

Mr. Ames: Yes, sir.

Judge Van Valkenburgh: You now wish to present that to the Court as now constituted?

Mr. Ames: Yes, sir. If your Honors please, we can save a good deal of time by not reading the affidavits, because there is no controversy. The affidavits show the shops and division point were moved as of January, 1927, and that the Railroad Company has taken no proceedings before the Corporation Commission of any kind since the 1st of January, 1927, and we offer in evidence the affidavit of Mr. E. D. Hicks, Jr., Secretary of Corporation Commission; the affidavit of Mr. C. C. Warren, and the affidavit of Mr. John F. Egan. There being no controversy about the fact, I will not stop to read the affidavits. Counsel for the other side have some affidavits to offer, and we — just as well complete our record of the fact.

[fol. 35] Mr. Franklin: I take it it would be a good idea for us to file our affidavits at this time.

Mr. Ames: Yes.

Judge Kennamer: All right.

Mr. Franklin: We desire to file the affidavit of J. E. Hutchison, Vice-President, in charge of operations of the St. Louis-San Francisco Railway, F. H. Shaffer, General Manager, St. Louis-San Francisco Railway Company, and H. L. Worman, Superintendent of Motive Power, St. Louis-San Francisco Railway Company, which affidavit is joint.

Mr. Ames: Now, with respect to that affidavit, if your Honors please, the defendants object as incompetent and immaterial, except the paragraph reading as follows:

"On or about February 10, 1927, we abandoned Sapulpa terminal, and trains moving east from Oklahoma City and moving north from Sherman, Texas, terminated at West Tulsa, instead of Sapulpa, and trains moving west from Afton, Oklahoma, terminated at West Tulsa, instead of Sapulpa."

We object to the rest as incompetent because it merely shows——

Mr. Franklin: That affidavit shows the saving that the Road has made during the time it has had it shops and terminal point at Tulsa since it has moved. I think the affidavit is competent.

Judge Van Valkenburgh: I assume that the objection will be noted, unless we hear whatever you have to say upon [fol. 36] the matter, then rule upon the proposition.

Mr. Franklin: We also offer the joint affidavit of the same three parties, which affidavit shows the cost that would be incurred if the Road was compelled at this time to move its shop and division point from the City of Tulsa to the City of Sapulpa.

Mr. Ames: We object to that as incompetent, and immaterial.

(The affidavits, so offered by counsel for both sides, are as follows:)

[Title omitted]

AFFIDAVIT OF E. D. HICKS, JR.

STATE OF OKLAHOMA,
Oklahoma County, ss:

E. D. Hicks, Jr. being duly sworn says that he is secretary of the Corporation Commission of the State of Okla- [fol. 37] homa, and that the above named plaintiff has not filed in the office of the Corporation Commission of Oklahoma any application for leave to remove its shops, division point and terminal facilities, or any of them, from the City of Sapulpa, Oklahoma, to West Tulsa, Oklahoma, or to any other place.

Affiant further says that no papers have been filed by the above named plaintiff since the 1st day of January, 1927, in the office of the Corporation Commission in the cause there pending, entitled "J. F. Lawrence, et al., versus St. Louis San Francisco Railway Company, et al., No. 2812.

Further affiant saith not.

E. D. Hicks, Jr. (Seal Corp. Com.)

Subscribed and sworn to before me this 19th day of October, 1927. Jane Callagy, Notary Public. My commission expires Aug. 9, 1931. (Seal.)

[fol. 38] AFFIDAVIT OF C. C. WARREN

STATE OF OKLAHOMA,
Creek County, ss:

C. C. Warren, being first duly sworn on his oath says: that he is now and has been since the year 1923, a resident of the City of Sapulpa; that for a period of 20 years he was in the service of various railroad companies in the United States; that during said time he has served in the capacity of Yard Master, and is, therefore familiar with the problems of operating a division point of a railroad; that since the establishment of the division point and terminals at Sapulpa, he has been familiar with the general conditions of the St. Louis San Francisco shops, yards and terminal facilities in the City of Sapulpa.

Affiant further states that in January of the year 1927, the St. Louis San Francisco Railway Company was maintaining in its yards at Sapulpa an eighteen stall roundhouse, and all equipment and machinery necessary to its operation, together with blacksmith and machine shops, with all necessary machinery and equipment for the purpose of repairing locomotives; and that said company was employing about 50 men in the operation of said round house, blacksmith and machine shops.

Affiant further states that at such time the St. Louis San Francisco Railway Company was maintaining in its yards at Sapulpa a Bridge and Building Department and has located in its yards machinery and equipment for cutting [fol. 39] timber for bridges and other railroad building equipment, in which department it employed regularly about 20 men.

Affiant further states that in January of the year 1927, Railway Company was also maintaining at such time at said terminal in said yards a Car Department and had located there a carpenter shop or machine shop, and that the same was fully equipped with all machinery necessary to the operation of said shop and that in such car department it had in its employ about 100 men.

Affiant further states that said St. Louis-San Francisco Railway Company maintained at such time in Sapulpa a large Freight Depot, at which it employed about 40 men.

Affiant further states that said St. Louis-San Francisco Railway Company operated five switch engine crews in its yards at Sapulpa; and employed about 60 men in the operation of its switch engines at said division point.

Affiant further states that said Company, at such time, employed about 20 men in its road and maintenance department at Sapulpa.

Affiant further states that said St. Louis-San Francisco Railway Company at such time had in its employ about 80 men who were engaged in the Freight Road Service of said company; that said men operated out of Sapulpa as a division point, and that there were also about 16 men engaged in the Passenger Road Service of said company, operating out of Sapulpa as a division point.

[fol. 40] Affiant further states that all of the employes in the various departments, mentioned above, during the month of January, 1927, were making their homes in Sapulpa, most of whom had resided in Sapulpa and had made their homes in said City for many years prior thereto.

Affiant further states that at such time the said St. Louis-San Francisco Railway Company maintained about 24 side tracks in its yards at Sapulpa with a capacity of about 1500 cars, and that it also maintained at Sapulpa a large stock pen for the accommodation of live stock transported by said St. Louis-San Francisco Railway Company.

Affiant further states that on or about the 10th day of February, 1927, said St. Louis-San Francisco Railway Company removed its division and terminal point from Sapulpa, Oklahoma, to West Tulsa, Oklahoma, and removed from said yards all machinery and equipment from said roundhouse, machine shops and carpenter shops; that said St. Louis-San Francisco Railway Company has also removed three tracks from its yards in Sapulpa; it has removed also all of its stock pens, which it formerly maintained at Sapulpa, except two small pens; that it has also removed two large water tanks from which engines at said yards were supplied; that it has removed the buildings in which the carpenter shops were maintained; that it has removed practically all materials and supplies for repairs of all

kinds and buildings, and in fact has literally stripped said yards and buildings of all equipment and facilities which [fol. 41] are necessary to maintaining and operating the various branches of its service, mentioned above.

Affiant further states that in making the change of said terminal from Sapulpa, Oklahoma, to West Tulsa, Oklahoma, that the said St. Louis San Francisco Railway Company has compelled practically all of the men in the various departments mentioned above to report for employment in West Tulsa, and only a very few of said employees are now employed by said company at Sapulpa; and that said company is at this time in no sense maintaining a division point at Sapulpa; but that it has been since the 10th of February, 1927, running all of its trains, both passenger and freight, in and out of West Tulsa as a division point.

C. C. Warren.

Subscribed and sworn to before me on this the 2 day of July, 1927. Sylvia Arnett, Notary Public. My commission expires January 31, 1929. (Seal.)

[fol. 42] AFFIDAVIT OF JOHN F. EGAN

STATE OF OKLAHOMA,
Creek County, ss:

John F. Egan, being first duly sworn upon his oath states:

That he is now and has been for the past 20 years, a resident of the City of Sapulpa, Oklahoma; that on or about the 10th day of February, 1927, the St. Louis San Francisco Railway Company removed its division and terminal point from Sapulpa, Oklahoma, to West Tulsa, Oklahoma, and removed from said yards all machinery and equipment from its roundhouse, machine shops and carpenter shops; that said St. Louis San Francisco Railway Company has also removed three tracks from its yards in Sapulpa; that it has removed also all of its stock pens, which it formerly maintained at Sapulpa, except two small pens; that it has also removed two large water tanks from which engines at said yards were supplied; that it has removed the buildings in which the carpenter shops were maintained; that it has removed practically all materials and supplies for

repair of all kinds and buildings, and in fact has literally stripped said yards and buildings of all equipment and facilities which are necessary to maintaining and operating the various branches of its service at said division and terminal.

Affiant further states that in making the change of said terminal from Sapulpa, Oklahoma, to West Tulsa, Oklahoma, that the said St. Louis San Francisco Railway Com-
[fol. 43] pany has compelled practically all of the men in the various departments mentioned above to report for employment in West Tulsa, and only a very few of said employees are now employed by said company at Sapulpa; and that said company is at this time in no sense maintaining a division point at Sapulpa, but that it has been since the 10th day of February, 1927, running all of its trains, both passenger and freight, in and out of West Tulsa as a division point.

John F. Egan.

Subscribed and sworn to before me on this the 9 day of July, 1927. Sylvia Arnett, Notary Public. My commission expires January 31, 1929. (Seal.)

[fol. 44] [Title omitted]

AFFIDAVIT OF J. E. HUTCHISON, F. H. SHAFFER, AND H. L. WORMAN

Before me the undersigned authority personally appeared J. E. Hutchison, Vice-President in Charge of Operation, St. Louis San Francisco Railway Company; F. H. Shaffer, General Manager, St. Louis San Francisco Railway Company; H. L. Worman, Superintendent of Motive Power, St. Louis San Francisco Railway Company, who, after being sworn, depose and say:

On or about February 10, 1927, we abandoned Sapulpa terminal, and trains moving east from Oklahoma City and moving north from Sherman, Texas, terminated at West Tulsa, instead of Sapulpa, and trains moving west from Afton, Oklahoma, terminated at West Tulsa, instead of Sapulpa.

[fol. 45] The elimination of Sapulpa terminal has resulted in a considerable saving in expenses. Within the past few

days we have had our forces work up under our directions figures from the records of the company, showing the reductions in the various items, and this saving amounts to $33,535.17 per month, or a yearly saving of $402,422.04. These figures are very conservative. There are many items which it is difficult to reduce to a money basis, the major reductions being in the Mechanical Department, per diem, wages, fuel, and other expenses incidental to transportation.

In making this saving, we have not in any way impaired the service at Sapulpa. On the other hand, we have greatly improved our service at Tulsa. It should be further remembered that this saving has been effected with a substantial increase in business handled at Tulsa over last year.

In addition to the above saving, we have also accomplished a saving of approximately one thousand dollars per month, or twelve thousand dollars per year, in the maintenance of buildings. That is, we are required to maintain shop buildings only at West Tulsa, whereas previously we maintained them at both Sapulpa and West Tulsa.

Our present operation permits of building in Tulsa terminal solid thru freight trains for Kansas City and for St. Louis, resulting in a very much improved service, with a decrease in cost. It also affords very much better service for points west and south of Sapulpa, by reason of the fact [fol. 46] that thru trains are built up solid in West Tulsa terminal, and it is not necessary to set out the entire train at Sapulpa, switch and change crews, as prior to February 10th. Neither is it necessary to do this on business destined east of Sapulpa, such trains now running thru to West Tulsa where there is an opportunity to make them up promptly and dispatch without delay.

By reason of the changed operating condition, we have been able to maintain a much more reliable movement of thru freight between St. Louis and Oklahoma and between Texas and St. Louis than we did when Sapulpa terminal was in operation. On account of the lack of yard room in Sapulpa terminal we were continually confronted with a congestion, trains being held out of that terminal an excessive length of time, which resulted in a high operating cost, to say nothing of the delay to the traffic.

By reason of the improved operating conditions, we are now running our freight engines in many cases thru be-

tween Kansas City and Sherman, Texas, between Oklahoma City and Monett, Missouri, and between Oklahoma City and Kansas City. We could not do this under the old arrangement of having Sapulpa as a terminal for the reason that the water at Sapulpa was very bad, required very heavy treatment, and the engines could not maintain these long runs on account of the action of the bad water on the boilers.

J. E. Hutchison, F. H. Shaffer, H. L. Worman.

[fol. 47] Subscribed and sworn to before me this 22nd day of October, 1927. R. H. Powell, Notary Public. My commission expires November 13, 1930. (Seal.)

[Title omitted]

AFFIDAVIT OF J. E. HUTCHISON, F. H. SHAFFER, AND H. L. WORMAN

Before me the undersigned authority personally appeared J. E. Hutchison, Vice President in Charge of Operation, St. Louis-San Francisco Railway Company; F. H. Shaffer, General Manager, St. Louis-San Francisco Rail-
[fol. 48] way Company; H. L. Worman, Superintendent of Motive Power, St. Louis-San Francisco Railway Company, who, after being sworn, depose and say:

If ordered to re-establish Sapulpa Terminal, the mechanical facilities and track arrangements would require an expenditure of approximately three hundred thousand dollars; and even with this expenditure we would not have adequate facilities to render efficient service, such as we are now rendering under the present arrangement of operating our trains out of West Tulsa.

It must be remembered that this three hundred thousand dollars required to re-establish Sapulpa as a terminal does not take into consideration the increased cost of operation by reason of the terminal being inadequate to properly handle our business, neither does it take into consideration the cost of purchasing additional power that is not now necessary by reason of running our power through. Going back to the congested condition we had when operating the

terminal at Sapulpa would mean the purchase of twenty or twenty-five Mikado type engines at a cost of approximately two million dollars.

To give us adequate facilities at Sapulpa to handle our business economically, we would have to abandon entirely the old location and go to the other side of town and build entirely new facilities at an approximate cost of $3,000,000; and then we would not have water fit for steam-making purposes.

[fol. 49] We have been able to make a tremendous saving in repairs to locomotive boilers and other parts of locomotives by reason of getting good boiler water at Tulsa. We are not troubled with flues and fireboxes leaking as we were while operating out of Sapulpa; this on account of the better water condition at Tulsa.

Furthermore, Sapulpa is not the economical point from which to operate our trains, due to the enormous amount of business which originates in the Tulsa district.

By disarranging our organization at Tulsa and moving back to Sapulpa we would not only disarrange the service at Tulsa and Sapulpa, but we would handicap the flow of traffic over practically the entire railroad, by reason of interfering with the manner in which our power is now being run through our terminals.

It is very difficult to arrive at the net saving made since abandoning Sapulpa as a terminal, by reason of the fact that since abandoning Sapulpa we have been able to run power over three, four and five divisions, and the work on a locomotive instead of being taken care of at one or two terminals is now running over practically the entire railroad, which results in a tremendous reduction in capital invested in power.

The old location at Sapulpa made it very difficult to operate that terminal successfully, due to the heavy grade on which the trains were handled, and in the above men[fol. 50] tioned expenditure of $3,000,000, of course, the grade would have been relieved around the town from the present location to the new facilities. We could not hope to operate in the old location without a very heavy increased cost in the entire operation.

Our patrons have called attention to the improved service since the abandonment of Sapulpa and since operating

out of Tulsa, and we think that the improved service has brought about considerable increase in our business into and out of the Tulsa district; and were we ordered to go back to Sapulpa and operate under the old conditions there is no question but that we would lose considerable traffic that we are now enjoying.

The actual expense of $301,000.00 which the company would incur if compelled to remove to Sapulpa at this time, as above set forth, consists of the following items:

Power plant (complete)	$40,000
Machinery	97,000
Boiler washing plant	5,000
Mill, shop and machinery	40,000
Oil pump facilities	21,000
Store department	2,500
Yard tracks	26,000
Other miscellaneous items and expenses	69,000
Total	301,500

Affiants further say that the actual expense incurred by [fol. 51] the company in moving the shops and division point from Sapulpa to Tulsa, as above described, has been not less than $150,000.00.

J. E. Hutchinson, F. H. Shaffer, H. L. Worman.

Subscribed and sworn to before me this 22nd day of October, 1927. E. H. Powell, Notary Public. My commission expires Nov. 13, 1930. (Seal.)

[fol. 52] Colloquy Between Court and Counsel

Judge Van Valkenburgh: Mr. Amos, it seems pertinent to inquire what you conceive the procedure should be at this stage. With respect to the final hearing, what is the procedure that you outline?

Mr. Amos: I think this Court cannot take this case up for final hearing until the Railroad Company has complied with the statute and sought the relief at the hands of the Corporation Commission and been denied that relief.

Judge Van Valkenburgh: Now, then, you made a remark this morning, and, of course, I say the Court is interested in it because it has some responsibility in it, with respect to the final hearing, and that is that it would be two years at least before this case would be ready for final hearing. What was your meaning when you said that?

Mr. Ames: My meaning is this, I say this Court has no right to conduct a final hearing in this case until the Railroad Company has complied with the Oklahoma statute, by proceeding before the Corporation Commission in a proper way.

Judge Van Valkenburgh: Very well, what connection has that with the length of time, which is, of course, a serious consideration?

Mr. Ames: I was using that by way of illustration. I do not know — long it will take.

Judge Van Valkenburgh: Assume they should reply, do you think it would take such a length of time to do that?

Mr. Ames: I imagine it would take at least a year to try [fol. 32] the case before the Commission and the Supreme Court of the State, to which appeal will probably be taken by one side or the other.

Judge Van Valkenburgh: The Supreme Court of the State?

Mr. Ames: Yes, sir.

Judge Van Valkenburgh: That was not necessarily contemplated by the Supreme Court of the United States' opinion, was it?

Mr. Ames: Well, not at all. Suppose the Corporation Commission, for instance, should decide they have a right to move.

Judge Van Valkenburgh: Yes.

Mr. Ames: We have a right to appeal to the Supreme Court of the State.

Judge Van Valkenburgh: I see your proposition.

Mr. Ames: If the Corporation Commission decides against the Railroad, it has a right to appeal to the Supreme Court of the State. The proceedings in the State court would probably be exhausted before it comes back to this Court, and it would probably take a year to do that; so that I assume there will be no final hearing until there is a final hearing in the Supreme Court. There may never

be a hearing here. They may be allowed to move. The Corporation Commission is not making this motion; it is being made by the Attorney General and the citizens of Sapulpa.

Judge Van Valkenburgh: The Corporation Commission [fol. 54] participated in the original hearing, I understand.

Mr. Ames: The Attorney General is appearing for it to that extent. Naturally, they will not say the act of the legislature is unconstitutional, because it is not a court with that power.

Mr. Stuart: If we should go before the Corporation Commission and they should make an order that we have no right to move, do you mean to say we could not come before this court?

Mr. Ames: No, I did not say anything like that. You can do as you please. We will present our views at the proper time. What I was saying is, there is a right of appeal. If they lose and do not exercise it, that is a matter for them to determine. If we lose, we have a right to exercise it.

(Thereupon counsel presented at length the matters before the Court, after which the following proceedings were had:)

Judge Van Valkenburgh: Well, gentlemen, this case has reached the stage where it presents unusual embarrassments. This Court feels very keenly the fact that its proper attitude, and the attitude of counsel at the former hearing, was not placed before the Supreme Court, either in the form of a decree or in the matter of the reasons stated by the Court for arriving at its conclusion. In the examination of the record entry, which is recited in the mandate of the Supreme Court, I find that there is no find- [fol. 55] ing as to irreparable injury, or as to the constitutionality or unconstitutionality of the statute, or of any action that was taken or contemplated by the Commission in derogation of the constitutional rights of the petitioner, even though the statute were constitutional. Then through the unfortunate circumstance that we have spoken of, the absence of the stenographer at the time the Court announced its conclusion, there was before the Supreme Court no statement whatever as to the ground upon which this

Court based its conclusion, except what must be derived from the issues presented by the petition and the hearing. The Supreme Court felt that this Court was premature and hasty in its action in not awaiting whatever comity, and what it deemed to be proper consideration, of the authorities of the State, until the short time had elapsed in which the Commission might have passed upon the question. Of course it was in the mind of the Court at the time, as it is now, and as it is indicated by counsel in response to questions of the Court, that the consideration of that question before the Commission would have taken some time and would not have been resolved on the 17th of January, nor any other date within any proximity to that, but be that as it may, this Court very cheerfully recognizes that there were some shortcomings in the procedure of this court on temporary hearing, and that it might very well, without what was then indicated to be upon the face of the record as irreparable injury, have indulged until recognition of the probability that the State authorities might be consulted [fol. 56] and would decide correctly before entering its order. There is nothing that this Court more cheerfully recognizes than the paramount authorities of the Supreme Court and the undoubted justice of their reasoning in that respect. So far we are constrained to feel that most of what was said had to do with the proprieties existing in matters of temporary hearings. We cannot accede to the proposition that the Supreme Court has foreclosed or outlined any decision as to the ultimate authority to be exercised in a matter of this sort. This is not the proper place to decide what is the opinion of this Court, because the Court had very decided views at that time, based upon what was before it, as justifying the temporary order. It never would have occurred to the Court to have made the order it did, or sought to make, but it was imperfectly stated due to the fact that it was not properly inspected by the Court, unless it had been a matter of common consent as the Court understood it on the part of counsel on both sides, that the desire was to get a speedy ruling of this Court upon the paramount authority to order or permit the removal of these shops. We think, as the Supreme Court says in this opinion, that undoubtedly the federal authority is para-

mount. Now the question is how much of circuity should be indulged in in the general opinion of both parties to the litigation, and of society, the state, and the nation, in the matter of interstate roads. Of course, with respect to the interstate train schedule, the opinion of the Supreme Court seems [fol. 57] clearly to indicate that with respect thereto, even the State Commission would never withhold its permission to install that schedule, but it is, perhaps, without avail to go further into analysis of the Supreme Court decision, except to say that in our judgment there is nothing of finality in it with respect to the procedure now, but inasmuch as they have so plainly indicated their desire to adhere to the mandate of the state law where that can be done without irreparable damage, injury, and sacrifice, we feel that we shall say now that the petitioner in this case, the Railroad Company, as a preliminary step toward further hearing of this case, shall apply to the Commission to dissolve its restraining order and to ratify the action of the Road in removing the shops, and that this case will not be put to final hearing until that is done. We wish also to say that the matters that have been presented by counsel today with respect to the matter of restitution, to our minds, raise a grave question as to the practical application of the doctrine in justice to all parties, taking into consideration the travelling public and the shipping public, as well as the parties. We think that that is a matter of such serious consideration that we ought not to announce a hasty decision on it, but we want to read these authorities cited. They have been, of course, read to us more or less in detail, but we want ourselves to examine into the facts and circumstances and conditions of the cases to see what distinctions, if any, existed. Therefore, we shall withhold our decision on that point until we have had an opportunity for [fol. 58] examination, but we wish to say this, that we must insist upon a prompt and speedy application to the Commission on the part of the Railway Company in the manner we have indicated, and that that action on their part, will, of course, be taken into consideration by us in passing upon this question of what ought to be done in the premises, in view of the decision of the Supreme Court and the present situation of affairs. I think there is nothing further to do at this time, except to have the order

drafted whereby the Road shall apply, as I have stated, to the Commission to get its order. In that way we shall, I think, follow out even to the letter the opinion of the Supreme Court. We do not want to appear in any respect as being in a position of controversy with that court.

Mr. Stuart: I have to say this, your Honors, that the Railway Company has no objection whatever to that procedure. We were in doubt ourselves, in an attempt to analyze that procedure, whether this court should retain jurisdiction and go to final judgment or whether we should go there and then come up here to rectify any wrong the Commission might do. We are perfectly willing to go there, and will go there. Judge Ames, will you go with us on a speedy action in that matter?

Mr. Ames: I reserve our action in that matter to ourselves.

Mr. Franklin: There you are.

Mr. Ames: In view of the Court's remarks, I wish to [fol. 59] make one statement for the record. Your Honor said counsel for both sides, at the hearing, indicated the desire for a speedy decision on the constitutionality question. My recollection is that so far as counsel for the defendants are concerned, they indicated a speedy desire for a review by the Supreme Court of the United States, and not a speedy desire for a decision on the constitutionality question in this court, but so far as this court was concerned were resisting the application for temporary injunction in every way they knew how.

Judge Van Valkenburgh: You mean to say that is your side was?

Mr. Ames: Yes, sir.

Judge Van Valkenburgh: I understand, but isn't that the real question of issue?

Mr. Ames: Yes, sir, we debated that. With reference to the form of the decree, I wish to assume no responsibility whatever for the form of that decree.

Judge Van Valkenburgh: I have not placed that. I think perhaps the court itself, which is so much in the habit of taking for granted the word of able counsel, will look after that.

Mr. Ames: Your Honor will recall——

Mr. Stuart: We will assume the responsibility.

Mr. Ames: The Supreme Court of the United States has criticized that decree. The decree was drafted by counsel for the plaintiff and was brought to Judge Kennamer's [fol. 60] chambers, where the Court and counsel for the defendants were waiting for it quite a while. It was never submitted to counsel for the defendants until submitted to the Court at the same time; so that we simply want the record to show we do not feel any responsibility at all for the mistakes in that decree.

Judge Van Valkenburgh: Oh, well, I don't think whatever may be the future of this case, that counsel will be held to be responsible. However, the responsibility for the Court's decree will rest with the Court.

Mr. Franklin: At this time, if the Court please, it may be this ought to be addressed to Judge Kennamer alone, I want to ask permission of the Court to file an amendment to the complaint. It is merely an amendment to the prayer, which is simply broadening the prayer and asking for general relief. The United States Supreme Court pointed out——

Judge Van Valkenburgh: If that should be done at all, it seems to me that is a matter that is entirely addressed to the Court now. As it has taken jurisdiction of the pleadings now, I think the amendment should be addressed to this Court.

Mr. Franklin: I will ask permission of the Court at this time to file this amendment. I have furnished Judge Ames with a copy.

Judge Van Valkenburgh: Very well.

Mr. Stuart: We desire also, if the Court please, that the affidavits we have filed today shall go to the Court and receive the attention of the Court with reference to this [fol. 61] matter of restitution.

Judge Van Valkenburgh: On both sides?

Mr. Stuart: Yes, sir, on both sides.

Judge Van Valkenburgh: Very well.

Mr. Stuart: And, your Honors, we would like for it to be understood this Court, as I understand it now, is still retaining jurisdiction of this controversy, and it is simply held in abeyance until we make the application to the Corporation Commission to get their judgment, so that if we desire to go against it we can come to this court.

Judge Van Valkenburgh: This court still retains jurisdiction.

Mr. Stuart: And that therefore will remain as it is until further order of the Court?

Judge Van Valkenburgh: Yes.

Mr. Franklin: In that connection does the Court desire us to draw a journal entry to that effect and have your Honors to sign it before you leave?

Judge Van Valkenburgh: I think that should be done.

Mr. Ames: I did not get that.

Mr. Franklin: I asked if they desired we draw a journal entry covering that feature and have them sign it.

Mr. Ames: I don't think your Honors can do it before you leave today. It is now five o'clock.

Judge Van Valkenburgh: While we are all together we want to dispose of that proposition. I will say this, that [fol. 62] if counsel will agree that the matter be drawn and submitted to counsel, then submitted to us individually to be signed by Judge Kennamer when we all three sign it, that is agreeable.

Mr. Ames: That is agreeable.

Mr. Franklin: That is satisfactory.

Judge Van Valkenburgh: That may be done.

Judge Kennamer: On the matter of restitution, that will be denied.

Mr. Ames: You are not denying the order of restitution?

Judge Kennamer: No, sir, on the one asking me to pass on it.

Mr. Ames: Yes.

Judge Van Valkenburgh: If you will prepare that and send it to me at Kansas City first, and give a copy also to Judge Reeves and Judge Kennamer, they will be here, they can then forward me their views upon the order, and I will also inspect the order. I would like to have it submitted to Mr. Ames so that he may also contemporaneously advise the Court what he thinks of it.

Mr. Ames: I would like to have a transcript of your Honor's remarks before the order is drafted.

Judge Van Valkenburgh: Very well, and before that I would also like to have a copy of what we said submitted to me, Mr. Reporter, so that I may see if I have inadvertently overlooked anything.

[fol. 63] Judge Kennamer: Judge Ames, on this matter of assessing damages, do you want an oral hearing?

Mr. Ames: Yes, sir, we would like to have a hearing as soon as it is convenient.

Which were all the proceedings had at the hearing of said cause.

[fol. 64] Clerk's certificate to foregoing omitted in printing.

[File endorsement omitted.]

[fol. 65] In United States District Court

[Title omitted]

Order Directing Plaintiff to Make Application to the Corporation Commission of the State of Oklahoma to Dissolve Restraining Order—Filed Oct. 22, 1927

Now on this 22nd day of October, 1927, the above matter being regularly before the court, and the plaintiff appearing by its attorneys, E. T. Miller, C. B. Stuart and Cruce & Franklin, and the defendants appearing by their attorneys, C. B. Ames and T. L. Blakemore, and the court having heard the argument and contention of counsel for both plaintiff and defendants, and having considered the opinion of the Supreme Court of the United States rendered in this case, is of the opinion that before further steps looking to a final hearing of this cause are taken, that said plaintiff should make application to the Corporation Commission of the State of Oklahoma, to dissolve its restraining orders heretofore made, restraining said plaintiff from removing its shops and division point from the City of Sapulpa to the City of Tulsa, and to ratify the action of said road in removing its said shops and division point during the pendency of this cause, and it further appearing to the court that the United States Supreme Court in its opinion rendered [fol. 66] in this cause, has plainly indicated that it is its desire to adhere to the mandate of the state law wherever that can be done without irreparable damage, injury or sacrifice and it further appearing to this court that application as directed herein may be made to the Corporation

Commission of the State of Oklahoma, by plaintiff, without its surrendering any of its alleged rights prayed for in its complaint filed herein, and that the application hereinafter directed may be made by said plaintiff without this court surrendering its jurisdiction of this cause;

It is, therefore, ordered that plaintiff, as a preliminary step to further hearing of this cause, and without unnecessary delay, and in good faith, make application to the Corporation Commission of the State of Oklahoma, to dissolve its restraining orders heretofore made by it, restraining said plaintiff from removing its shops and division point, or any part thereof, from the City of Sapulpa to the City of Tulsa, and to ratify the action of said plaintiff in the removal of its said shops and division point from the City of Sapulpa to the City of Tulsa, which has been effected during the pendency of this cause in this court.

It is further ordered that unless otherwise ordered by this Court, final hearing of this cause be suspended until the result of said application to the Corporation Commission be ascertained, and it is further ordered that this court shall and will retain jurisdiction of this cause so that any action, order or judgment may be taken or made by this court that may be necessary to protect the rights of any parties hereto.

Arba S. Van Valkenburgh, Circuit Judge. Albert L. Reeves, District Judge. F. E. Kennamer, District Judge.

O. K. Cruce & Franklin, Attorneys for Plaintiff. C. B. Ames, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 67] In United States District Court

[Title omitted]

Before Arba S. Van Valkenburgh, U. S. Circuit Judge; Albert L. Reeves, U. S. District Judge; Franklin E. Kennamer, U. S. District Judge

Opinion—Filed Nov. 28, 1927

[fol. 68] Per Curiam:

This action was instituted by the St. Louis San Francisco Railway Company on January 11, 1927, against J. F. Law-

rence and C. C. Taylor, citizens of the city of Sapulpa, Oklahoma, the Corporation Commission of Oklahoma, and the State's Attorney General. Upon the filing of a verified bill of complaint setting forth facts hereinafter detailed, and in accordance with the allegations and prayer of the bill, a temporary restraining order was issued, returnable on the 19th of January, 1927. It was provided in the restraining order that complainant was to take no action in the premises pending a hearing on the application for the temporary injunction. A copy of this order was duly served upon the defendants.

The bill alleged in substance that the plaintiff was a corporation organized under the laws of the State of Missouri, as a railway company engaged in both intrastate and interstate commerce, operating in the States of Missouri, Kansas, Arkansas, Oklahoma, Texas, Mississippi and other states; that during the month of February, 1917, defendants J. F. Lawrence and C. C. Taylor, appearing on behalf of the Chamber of Commerce of Sapulpa and the citizens of said city, filed a complaint with the Corporation Commission of Oklahoma to prevent the plaintiff railway company from moving its shops and division point from the city of Sapulpa to the City of Tulsa; that the Commission, by order Number 1232, temporarily restrained plaintiff from moving its shops or division point on February 15th, 1917, as sought in said complaint; that upon an application of defendants Lawrence and Taylor filed on December 29th, 1926, the Corporation Commission made and caused to be served upon plaintiff, the following order:

[fol. 69] "This cause coming on to be heard on this 29th day of December, 1926, upon motion of the complainants, and it appearing that the defendant is taking steps toward the removal of its shops and division point from the City of Sapulpa in violation of the order of this Commission entered on the 5th day of February, 1917, and in violation of the Act of the Legislature passed in 1917, it is ordered by the Commission that said cause be set down for hearing on the 17th day of January, 1927, and that in the meantime, and until the further order of the Commission, the defendant be, and it is hereby prohibited from moving its shops or division point from the City of Sapulpa, from changing the runs of either its passenger or freight trains,

or from taking any other steps towards changing its division point for either passenger or freight service from the said City of Sapulpa."

The provisions of the Oklahoma Statute relied upon for the jurisdiction of the Corporation Commission were set forth, as follows:

"Compiled Oklahoma Statutes, 1921

"3482. Removal—Permit.—That no person, receiver, firm, company or corporation owning, operating or managing any line of steam railroad in this State shall be allowed to remove railroad shops or division points which have been located at any place in this State for a period of not less than five years without previously securing the permission of the Corporation Commission to make such removal.

"3483. Corporation Commission—Jurisdiction.—If, and when any such person, receiver, firm, company or corporation desires to remove any such railroad shops or division point described in Section One of this Act, it shall be his duty to file an application with the Corporation Commission setting forth the present location of such shops or division point and the reasons for such removal, and thereupon the Corporation Commission shall have full power and jurisdiction to entertain such complaint, but before hearing the same or making any order permitting such removal to be made, said cause shall be set down for hearing, not less than ten days' notice shall be given the city, town or village in which or at which such shops or division point have been maintained, and after giving all parties interested a full and complete hearing in the premises the Commission may in its discretion permit or refuse such request for a removal.

"3484. Hearing—Before a Corporation Commission.—When an application is filed before the Commission for the removal of terminals or car shops, as provided in Section Two, the Commission shall hear evidence on the relative efficiency and expense of handling traffic through the proposed terminal as compared with the present facilities, and shall consider all other facts and circumstances affecting

the various interests involved. In determining the adequacy of the present facilities the Commission shall consider the same increased by an expenditure equal to an amount necessary to remove the same to the proposed location or an amount equal to the necessary expenditure to establish such facilities at the new location. It is hereby further provided that the Commission shall hear evidence and shall make a finding of fact as to the sanitary and habitable conditions of the proposed location of said terminal facilities would endanger or injuriously affect the health of the employees of said applicant or their families, the [fol. 70] Commission shall deny said application and order the said terminal facilities and car shops to remain at the present location.

"3485. Proof—Burden Upon Applicant.—On any such hearing, as provided in this act, the presumption shall be against the removal, and the burden of proof rest upon the applicant to show that such removal ought to be made.

"5548. Transportation Companies Must Maintain Repair Shops in State.—Transportation companies operating within this State which now have in existence round-houses or machine shops for the repairing of locomotives, engines and cars, or which may hereafter establish such round-houses or machine shops for such purpose, shall hereafter maintain such shops and round-houses with sufficient equipment and employees to keep in proper repair all rolling stock, locomotives, engines, and cars used within this State in the transportation of passengers and freight and such transportation companies shall hereafter cause all such rolling stock, locomotives, engines and cars to be repaired at such shops or round-houses and kept in a safe and serviceable condition and no such repair shall be done outside the State of Oklahoma, if such repairs can be done at such company's shops within this State."

The bill charges that these statutory provisions are unconstitutional and that the Corporation Commission was without power to act under such statutes for the reason that they are not a proper exercise of the police power of the state. That they deprive plaintiff of due process of law, and the equal protection of the law; that they are arbitrary, unreasonable and unnecessary; that said statutes were

enacted to serve local interests, and purport to grant to the Corporation Commission authority to regulate interstate commerce. It is then alleged that the shops were located at Sapulpa more than thirty years ago when that city was the terminus of the line; that the lines have been extended into Oklahoma and Texas; that by reason of the growth of Tulsa and its attendant increase of business, it has become the center of plaintiff's operations; that Sapulpa has ceased to be the center of its operations and that it is necessary to remove its shops to Tulsa.

It is further alleged that it is impossible to construct shops sufficient to care for the repairs and business of plaintiff at Sapulpa and that plaintiff has established shops at Tulsa, and that interstate commerce will be aided by a consolidation of the two shops, which are eighteen miles apart. Plaintiff also alleges that the enforcement of the [fol. 71] order of the Corporation Commission would prevent the putting into effect of its schedule regulating its interstate trains, as well as interfere with the management and operation of plaintiff's interstate commerce business to such an extent as to cause plaintiff great immediate and irreparable damage. It was then alleged that plaintiff was without remedy at common law, and prayed for an injunction to avoid a submission to the jurisdiction of the Corporation Commission. A preliminary injunction was sought in order that plaintiff may not suffer irreparable damage and injury.

In response to the order served upon defendants, for a hearing upon the application for a preliminary injunction, plaintiff and defendants appeared and announced ready, presented their evidence in the form of affidavits and argued the cause at great length, on the date provided in the order, to wit: January 19, 1927.

In accordance with the provision of Sec. 266 of the Judicial Code (37 Stat. at large 1013, Chap. 161; Comp. Stat. Sec. 1243; 5th Fed. Annotated Stat. 2d Ed. page 984), the application for a temporary injunction was heard by Van Valkenburgh, Circuit Judge, and Reeves and Kennamer, District Judges. Upon the conclusion of the hearing, and upon the proof adduced it was determined by the Court that the Oklahoma Statute as construed by the Corporation Commission constituted a direct interference with

interstate commerce. The Court entertained the opinion that the statutes were not fair, reasonable or proper exercises of the police power of the State, but were unnecessary and an arbitrary interference with and restriction upon the rights of plaintiff to adjust its business to the rapidly changing conditions in the handling of interstate freight and passengers.

We were convinced from the facts established during the hearing and the arguments and authorities submitted that the statute involved was probably unconstitutional, and that the railroad company should not be compelled to maintain [fol. 72] two shops which were proved to be heavy burdens upon interstate commerce. Without finally determining the constitutionality of the statute, we concluded, from the showing made, that plaintiff was entitled to the temporary relief which it sought.

The evidence presented by plaintiff in support of the allegations of its bill as to the burdens caused by maintaining two sets of shops within a space of eighteen miles, the necessity of maintaining shops at Tulsa because of the growth and development of Tulsa as a shipping center during the past ten years, and the increased cost of operations by reason of the maintenance of two shops and division points was uncontradicted and not seriously controverted.

Upon arriving at the above conclusion respecting the invalidity of the statute considered, it was agreed that Circuit Judge Van Valkenburgh should orally deliver the opinion of the court. This was done in open court, in the presence of all of the parties and their counsel. Thereafter, counsel for the respective parties were requested to prepare proper orders granting the temporary injunction, which was done. The order was presented to the Court in the presence of counsel, and, as no objections had been interposed to its form, it was signed. The court thought that the opinion of Judge Van Valkenburgh had been reduced to writing and incorporated in the record of the case and, therefore, did not require findings in the decree. The first information that the reasons for granting the temporary injunction were not included in the record on appeal was from the opinion handed down in the case by the Honorable Supreme Court of the United States.

Upon the presentation of the journal entry of the decree, counsel for the defendants were afforded an opportunity of superseding and suspending the order pending the appeal by executing a bond. The court was then and there advised that it was not the desire of the defendants to supersede or suspend the decree pending the appeal. [Fol. 73] The Supreme Court of the United States, in passing upon this case, did not determine the constitutionality of the statutes considered, saying: "We have no occasion to determine whether the Oklahoma Act is obnoxious to the Federal Constitution." The Supreme Court concluded that "there was no emergency requiring the issue of an interlocutory injunction" and that the railroad company in contesting with the defendants their rights to remove the shops before the State Corporation Commission would not waive its right to challenge the validity or invalidity of the statute if the Commission decided adversely to its contention in the Federal Court. It was stated by the Supreme Court that "the federal power is paramount." The cause having been remanded to this Court for further proceedings, a motion has been filed and presented by the defendants seeking an order of restitution.

Subsequent to the entering of the temporary injunction and after counsel for defendants had announced that they would not suspend the order of the Court pending the appeal, plaintiff removed its division point and its shops to Red Fork, now a part of the City of Tulsa. It is insisted by counsel for defendants in presenting their motion for an order of restitution that the shops should be returned to Supulpa from Red Fork pending the final determination of the case as the temporary injunction has been set aside on appeal. The following authorities have been submitted as sustaining defendant's contentions:

Northwestern Fuel Co. v. Brock, 139 U. S. 216;
Morris v. Gray, 27 Okla. 696;
Silver Peak Mines v. Hatchett, 93 Fed. 76;
Twenty-One Mining Co. v. Original Sixteen Min., 200 Fed. 106;
Baker v. Bixby, 216 Pac. 628;
Texas Land & L. Co. v. Saunders, 111 S. W. 688;
Atlantic Coast Line Ry. Co. v. Seaboard, etc. R. Co., 71 S. E. 38;
Herrington v. Herrington, 11 Ill. App. 121;
Mangelsen v. Love, 50 Ill. App. 629

An examination of these cases discloses that they are not controlling of the situation presented in the case. The cited cases involved the right to money or property or the [fol. 74] right to possession of property, and in most of them restitution was ordered after final hearing, or where the result could be clearly foreseen at the hearing which determined the right to the property.

Restitution may be ordered where a party violates an injunction which he is seeking. The final determination of this cause can not be foreseen; neither can we say that the plaintiff has taken any undue advantage of the situation. Defendants were afforded an opportunity to suspend the temporary injunction by executing a bond, which they declined to do. It was required that plaintiff execute a bond before it was permitted to remove the shops. This was done; it would be unwise in our opinion to require plaintiff to remove the shops to Sapulpa pending the final determination of the cause. As there is no final decree in the case, and as we are unable to determine the outcome of the matter at this stage of the proceedings, and as the removal of the shops will not deprive defendants of the benefits of their victory, in the event of their prevailing in the case, we do not think restitution is proper. Where the decision on appeal leaves the case undetermined on the merits, and on a final hearing a permanent injunction would be justified, and as in this case, where the decree has been reversed and set aside for error in the matter of procedure, restitution may be denied pending final determination.

In Gould v. McFall, 118 Pa. 445, 12 Atl. 330, 4 Am. St. Rep. 606, it was said:

"Restitution is not a mere right; it is ex gratia, resting in the exercise of a sound discretion, and the Court will not order it where the justice of the case does not call for it. Nor where the process is set aside for a mere slip."

See State ex. Horton, et al., (Neb.) 97 N. W. 434. In Gaffney v. Weeks, 271 U. S. 536, 70 Law. Ed. 1074, the Court said:

[fol. 75] "On an appeal from a temporary injunction it often happens that where there was a balance of convenience and doubt as to the issue, the status quo under the re-

straining order and the restoration should be maintained until a final hearing."

We are of the opinion that nothing can be accomplished, considering and balancing the conveniences in the case, by requiring the plaintiff to remove the shops to Sapulpa pending a final determination of the case. The shops were moved at great expense to the plaintiff, and further great expense will be incurred if the shops are restored; defendants could have prevented the removal by executed a bond, which they declined to do, and as the issues now presented are so doubtful, this court, in the exercise of a sound discretion, should deny restitution. In so ruling, the comparative advantages and disadvantages involved, the conveniences and inconveniences, of the parties hereto, as well as the interests of the shipping public generally, have been fully considered. We think an order of restitution should not be made, if at all, until after final hearing, when the ultimate rights of the parties are established.

In compliance with the directions of the United States Supreme Court, plaintiff has been directed to proceed before the State Corporation Commission for the approval of that body of its acts in removing the shops to Tulsa. In the event of an approval of the removal by the Commission, there will be nothing further for the consideration of this Court, and the controversy will be terminated, unless the order of the Commission is reversed by the State Supreme Court.

In the event of plaintiff's failure to obtain the consent and approval of the Corporation Commission, it may still have the controversy finally determined in the Federal [fol. 76] Courts. This Court is retaining jurisdiction of the parties hereto, although plaintiff is required to proceed before the Commission, and should the matter be ultimately determined in defendants' favor, restitution may be ordered, as well as the payment of all damages sustained by defendants by reason of the removal of the shops.

Motion of defendants for restitution is denied. Plaintiff is ordered to forthwith proceed before the Corporation Commission of Oklahoma.

[File endorsement omitted.]

[fol. 77] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER RE MOTION FOR RESTITUTION—Filed Oct. 22, 1927

This cause came on to be heard on the 22nd day of October, 1927, upon the motion of J. F. Lawrence, C. C. Taylor, and Edward Dabney, Attorney General, to require the Plaintiff in said cause to restore the status quo existing at and before the temporary injunction was granted by returning the shops and division point to Sapulpa. The Plaintiff appeared by its attorneys, E. T. Miller, C. B. Stuart and Cruce & Franklin, and the moving defendants appeared by their attorneys, C. B. Ames, T. L. Blakemore, and C. J. Davenport. When the court convened there was sitting Hon. Arba S. Van Valkenburgh, Circuit Judge, Hon. Albert L. Reeves, District Judge, and Hon. F. E. Kennamer, District Judge and the Judge of said Court. Thereupon the moving defendants objected to three judges sitting in said cause, on the groung that their motion to require restitution did not require or permit the presence of three judges under Sec. 380, of the United States Code, or any other provision of Law. Upon this motion being presented and argued it was overruled by the court composed of three judges, as aforesaid. Thereupon, the moving defendants presented an application to the Hon. F. E. Kennamer, Judge of said court, praying that he sit alone and, as Judge of said court, hear their motion, and this motion was overruled by the Hon. F. E. Kennamer, District Judge.

Thereupon, the aforesaid motion to require restitution was presented to the court composed of three judges, and after argument of counsel the court took said motion under [fol. 78] advisement, but retained jurisdiction of said cause.

Arba S. Van Valkenburgh, Circuit Judge. Albert L. Reeves, District Judge. F. E. Kennamer, District Judge.

O. K. Cruce & Franklin, Attorneys for Plaintiff. C. B. Ames, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 79] IN UNITED STATES DISTRICT COURT

[Title omitted]

SUPPLEMENTAL COMPLAINT—Filed Jan. 12, 1928

To the Honorable Judges constituting the District Court of the United States for the Northern District of the State of Oklahoma:

Come now the St. Louis-San Francisco Railway Company, plaintiff above named, and permission of this Honorable Court having been first had and obtained, files and presents this its supplemental complaint in said cause.

Plaintiff would respectfully show and call to the attention of the court as a part of its cause of action alleged in its original complaint, and in support thereof, the following matters occurring subsequent to the filing of its original complaint:

I

That on the 19th day of January, 1927, the United States District Court for the Northern District of the State of Oklahoma, consisting of Circuit Judge, the Honorable Arba S. Van Valkenburgh, District Judge, the Honorable Albert L. Reeves, and District Judge, the Honorable Frank [fol. 80] lin E. Kennamer, made and issued, upon the application of this plaintiff, a temporary injunction in said cause, enjoining the above named refendants, and all of them, and all persons similarly situated, and all persons acting with them, their agents, servants and employes, and all persons acting by or under their authority, from prosecuting, hearing, conducting or permitting a hearing to be had, or from taking or permitting any further proceedings to be had in a certain cause then pending before the Corporation Commission of the State of Oklahoma, having for its purpose the prevention of plaintiff from removing its shops and division point from the City of Sapulpa to the City of Tulsa, and further enjoining and restraining said defendants, and all of them, from causing to be made, promulgated or enforced any order in said cause prohibiting plaintiff from removing its said shops or division point, or appurtenances thereto, or from changing the run of any of its trains or crews, and further enjoining said defendants and all of

them from doing anything that would in any manner interfere with, or prohibit plaintiff from removing its shops or any appurtenances thereto, or its division point, or any part thereof, from the City of Sapulpa to the City of Tulsa, or from changing the run of any of its trains or crews so that the same would terminate at the City of Tulsa, instead of the City of Sapulpa; that said order, by its terms, was to become effective upon the filing, by this plaintiff, and the approval thereof by the Clerk of said Court, of a bond, properly conditioned according to law, in the sum of $50,000.00, and was to remain effective until further order of the court. A copy of said order is attached to and made a part of this supplemental complaint, and is hereinafter more specifically referred to; that thereafter in due time plaintiff made and filed its bond in the sum of $50,000.00, as required by said order, with the Clerk of said Court, which said bond was regularly approved by said Clerk.

II

Plaintiff would further show that thereafter and on the [fol. 81] 24th day of January, 1927, defendants presented to said court their petition for appeal, which said petition was in regular form and contained, among other things, the following representation:

"Your petitioners further pray that the proper order touching security be made without superseding the decree referred to, and they tender bond in such sum as the court may require."

That in accordance with said petition, said appeal was prosecuted as provided by law, without the judgment of the District Court granting the temporary restraining order above referred to, being superseded; that during said appeal said restraining order remained in full force and effect and continued in full force and effect until reversed by the Supreme Court of the United States, by reason of said appeal, on the 31st day of May, 1927.

III

That during the pendency of said appeal to the Supreme Court of the United States, and during the time that the judgment of the District Court of the United States for

the Northern District of Oklahoma was in full force and effect and unsuperseded, the plaintiff moved its shops and division point, as described in its original complaint filed herein, from the City of Sepulpa to the City of West Tulsa, and at the time said temporary injunction was vacated, as above described, plaintiff's said shops and division point had been completely moved from the City of Sapulpa to the City of West Tulsa, and were in complete operation at West Tulsa.

IV

Thereafter, and on the 25th day of June, 1927, the above named defendants filed their application with this court for an order requiring this plaintiff to immediately remove its shops and division point from West Tulsa to Sapulpa, and to restore the status quo during the pendency of this suit, so that all parties would be placed in exactly the same position that they would have occupied had the interlocutory [fol. 82] injunction not issued; that on the 22d day of October, 1927, said application on behalf of said defendants came on to be heard before the Honorable Arba S. Van Valkenburgh, Circuit Judge, the Honorable Albert L. Reeves, District Judge, and the Honorable Franklin E. Kennamer, District Judge, sitting as the District Court of the United States in and for the Northern District of Oklahoma, and at said time said matter was fully presented to said court, and at the conclusion of the hearing thereof, and after taking said matter under advisement, said court rendered its written opinion holding among other things that it would be unwise and unnecessary to require this plaintiff to remove its shops and division point from West Tulsa to the City of Sapulpa during the pendency of this cause. Said opinion had the effect of denying defendants' application for the restoration of the status quo during the pendency of said hearing, and permitting plaintiff to retain its said shops and division point at West Tulsa during the pendency of this cause. Said court, in said opinion, among other things, said:

"The final determination of this cause cannot be foreseen; neither can we say that the plaintiff has taken any undue advantage of the situation. Defendants were afforded an opportunity to suspend the temporary injunction by exe-

cuting a bond, which they declined to do. It was required that plaintiff execute a bond before it was permitted to remove the shops. This was done; it would be unwise in our opinion to require plaintiff to remove the shops to Sapulpa pending the final determination of the cause. As there is no final decree in the case, and as we are unable to determine the outcome of the matter at this stage of the proceedings, and as the removal of the shops will not deprive defendants of the benefit of their victory, in the event of their prevailing in the case, we do not think restitution is proper. Where the decision on appeal leaves the case undetermined on the merits, and on a final hearing a permanent injunction would be justified, and, as in this case, where the decree has been reversed and set aside for error in the matter of procedure, restitution may be denied pending final determination. * * *

"We are of the opinion that nothing can be accomplished, considering and balancing the conveniences in the case, by requiring the plaintiff to remove the shops to Sapulpa pending a final determination of the case. The shops were moved at a great expense to the plaintiff, and further great expense will be incurred if the shops are restored; defendants [fol. 83] could have prevented the removal by executing a bond, which they declined to do, and as the issues now presented are so doubtful, this court, in the exercise of a sound discretion, should deny restitution. In so ruling, the comparative advantages and disadvantages involved, the conveniences and inconveniences, of the parties hereto, as well as the interests of the shipping public generally, have been fully considered. We think an order of restitution should not be made, if at all, until after final hearing, when the ultimate rights of the parties are established."

In said opinion said court further directed that in compliance with the directions of the United States Supreme Court, this plaintiff proceed before the Corporation Commission of the State of Oklahoma, by a proper application, for the approval of that body of its acts in removing its shops and division point from Sapulpa to Tulsa, said direction contained in said opinion being as follows:

"In compliance with the directions of the United States Supreme Court, plaintiff has been directed to proceed be-

fore the State Corporation Commission for the approval of that body of its acts in removing the shops to Tulsa. In the event of an approval of the removal by the Commission, there will be nothing further for the consideration of this Court, and the controversy will be terminated, unless the order of the Commission is reversed by the State Supreme Court.

"In the event of plaintiff's failure to obtain the consent and approval of the Corporation Commission, it may still have the controversy finally determined in the Federal Courts. This Court is retaining jurisdiction of the parties hereto, although plaintiff is required to proceed before the Commission, and should the matter be ultimately determined in defendants' favor, restitution may be ordered, as well as the payment of all damages sustained by defendants by reason of the removal of the shops."

In further direction that this plaintiff apply to the Corporation Commission of the State of Oklahoma for approval of its acts in removing said shops and division point from Sapulpa to West Tulsa, said Court, on the said 22d day of October, 1927, made its written order, directing, as a preliminary step to the further hearing of this cause, that this plaintiff, without unnecessary delay and in good faith, make application to the Corporation Commission of the State of Oklahoma to dissolve its restraining orders heretofore made by it, restraining said plaintiff from removing [fol. 84] its shops and division point, or any part thereof, from the City of Sapulpa to the City of Tulsa, and to ratify the action of said plaintiff in the removal of its said shops and division point from the City of Sapulpa to the City of Tulsa, which said removal had been effected during the pendency of this cause in this Court. Both said opinion and said order are on file with the Clerk of this Court, and are both referred to herein, and by reference made a part of this supplemental complaint, the same as if fully set out herein.

V

Plaintiff further shows that in compliance with the court order above referred to, and on the 5th day of November, 1927, plaintiff filed its application before the Corporation

Commission of the State of Oklahoma, asking that said Commission set aside its said restraining orders theretofore made, restraining said plaintiff from removing its shops and division point from the City of Sapulpa to West Tulsa, and to approve the removal of said shops and division point, and to ratify the action of said plaintiff in removing said shops from the said City of Sapulpa to West Tulsa, as hereinbefore described. A copy of said application, together with all exhibits attached thereto, said exhibits consisting of the order of the Corporation Commission of the State of Oklahoma, No. 1232, order of the Corporation Commission of the State of Oklahoma, No. 3699, temporary restraining order issued by this Court in this cause, temporary injunction issued by this Court in this cause, and the order of this Court directing plaintiff to make application to said Commission, is hereto attached, marked Exhibit "A," and made a part of this supplemental complaint, the same as if all said instruments were fully quoted and set out in the body hereof.

That plaintiff, thereafter, pursued said matter before the Corporation Commission in good faith and with expedition, having had said application set down for hearing before said Commission on the 5th day of December, 1927. But plaintiff would further show to the court that the defend[fol. 85] ant, J. F. Lawrence and C. C. Taylor, and the City of Sapulpa and the Chamber of Commerce of the City of Sapulpa, on behalf of the inhabitants of said City, objected to the Corporation Commission hearing said matter on its merits, and objected to the Corporation Commission, at this time, passing upon the question as to whether or not it should issue its order permitting and ratifying said removal, and prior to the date of said hearing before said Commission, filed with said Commission its written objections to said hearing, contending therein that said Commission should not hear plaintiff's application for the reason that plaintiff had already removed its shops and division point from Sapulpa to West Tulsa in violation of said Commission's orders, and had not offered to restore its said shops and division point, even though said application should be denied by said Commission. A copy of said written objections, together with the exhibit attached thereto, is hereto attached marked Exhibit "B", and made a part

of this supplemental complaint the same as if fully set out and quoted herein.

VI

Plaintiff would further show to the court that on the 5th day of December, 1927, the day on which its said application was set for hearing before said Commission, plaintiff appeared, by its attorneys, before said Commission and, in good faith, insisted upon a hearing on its said application, but plaintiff shows that said defendants, J. P. Lawrence and C. C. Taylor, and the City of Sapulpa and the Chamber of Commerce of the City of Sapulpa, on behalf of the inhabitants of said City, appeared before said Commission by their duly authorized attorneys, and objected to said hearing, and insisted upon said Commission sustaining their said objections to said hearing, and as a result thereof plaintiff shows to the Court that said last named defendants and said above named parties, by their said objections, prevented said Commission from hearing plaintiff's said application and deciding same on its merits, but by said objections and the presentation thereof to said Commission at said time, caused said Commission to make its order refusing and declining to hear plaintiff's said application. A copy of said order of said Commission so made on the 5th day of December, 1927, denying this plaintiff a hearing on [fol. 86] its said application, is hereto attached marked Exhibit "C", and made a part of this supplemental complaint, the same as if fully quoted and set out herein.

VII

Plaintiff shows to the court that the effect of the ruling of the Commission is that it will not hear plaintiff's said application until it has removed its shops and division point from West Tulsa to Sapulpa. In this connection, plaintiff alleges that such a move at this time would cost plaintiff an immediate cash expenditure of approximately $200,000.00; that it would materially disrupt and disarrange the efficient service now being rendered by the terminal facilities at West Tulsa; that such a movement would not only disarrange and disorganize the service being rendered at West Tulsa, but would handicap the flow of traffic over prac-

tically the entire road by reason of interfering with the manner in which the trains are being run through the different terminals.

In order to remove the shops and division point from West Tulsa to Sapulpa, and at the same time continue to render the public the service that is now being rendered, it would be necessary for plaintiff not only to make an immediate expenditure of approximately $300,000.00, but such a move, if the same service as is now being rendered to the public were maintained, would mean an additional expenditure in the way of extension and reconstruction of yards at Sapulpa, and the purchase of additional motive power, of some $3,000,000.00. In addition to the above, plaintiff would suffer a monthly loss of more than $25,000.00, which sum is now being saved by plaintiff by reason of the consolidation of the Sapulpa and Tulsa terminal facilities, and the operation of same at West Tulsa.

By reason of the things above enumerated, plaintiff shows to the Court that it should not be compelled to comply with the condition placed upon it by the Corporation Commission in order to secure a hearing on its application; that such a compliance would work a great injustice to both plaintiff and the shipping public.

[fol. 87] VIII

Plaintiff further shows to the court that by reason of the removal of its shops from Sapulpa to West Tulsa, it has been enabled to materially increase the efficiency of its service to the public; that a careful check of its expenditures for the eight months from March to October, inclusive, 1927, during which time its shops and division point were in operation at West Tulsa, shows a reduction of its operating expenses, by reason of the removal of its terminal facilities from Sapulpa, and the consolidation of same with those at West Tulsa, of more than $25,000.00 per month, or more than $300,000.00 per annum; that an inspection of its facilities during said months has shown a material increase in the efficiency of its public service; that such inspection has also shown that the location of its terminal facilities at West Tulsa, and the vicinity thereof, is sanitary, healthful and in every way suitable to the convenience, health and enjoyment of its employes.

IX

Plaintiff shows it has fully complied with this Honorable Court's order, directing it to make application as above described, to the Corporation Commission of the State of Oklahoma; that said Commission has refused to hear said application except upon the condition as in this supplemental complaint described and set forth. Plaintiff says, therefore, that this Court ought, in justice, equity and good conscience, to proceed with the hearing of this cause as prayed for in plaintiff's original complaint.

Wherefore, premises considered, plaintiff prays that this Court set this cause down for final hearing, and upon final hearing plaintiff prays, as it prayed in its original complaint and its amendment thereto, that said defendants, and each and every one of them named and described herein, and all persons for whom said defendants appear in said above described cause, and all persons whomsoever, acting [fol. 88] under or by the authority of said defendants, or any of them, be restrained and enjoined from prosecuting, hearing, conducting or permitting a hearing to be had, or taking or permitting any further proceedings to be had in the cause pending before the Corporation Commission of the State of Oklahoma, as herein and in its original complaint described, or from making, promulgating or enforcing, or causing to be made, promulgated or enforced any order prohibiting plaintiff from removing any of its shops or appurtenances thereto, or its division point, or any part thereof, from the City of Sapulpa to the City of Tulsa, and that they, and all of them, be further restrained from doing any act having for its purpose to prevent the changing of the run of any of plaintiff's passenger trains so that the crews thereon may change at the City of Tulsa instead of the City of Sapulpa, or from doing any act which has for its purpose the prevention of said plaintiff from removing its shops or division point from the City of Sapulpa to the City of Tulsa, or from doing any act which has for its purpose the prevention of plaintiff from retaining its said shops or division point, or any part or either of them, at the City of Tulsa, instead of the City of Sapulpa, or from doing any act which, in any manner, interferes with the plaintiff maintaining its said shops and division point at the City of Tulsa.

Plaintiff further prays that on a final hearing of this cause, the petition of this plaintiff in removing its shops and division point from the City of Napolpa to West Tulsa be finally approved, and that said defendants, and all of them, and all persons for whom said defendants appear in this cause, and the agents, servants and representatives of said defendants, or any such persons, be permanently enjoined from doing any of the acts as above described.

Plaintiff further prays that it be granted such other relief, either general or special, to which, in good conscience and equity, it may be shown to be entitled in the premises.

E. T. Miller, C. B. Stuart, Price & Franklin, Attorneys for Plaintiff.

[fol. 89] Duly sworn to by Ben Franklin. Jurat omitted in printing.

[fol. 90] Exhibit "A" to Supplemental Complaint

Before the Corporation Commission of the State of Oklahoma

Cause No. ....

In re Application of the St. Louis San Francisco Railway Company to said Commission to set aside its outstanding orders heretofore made restraining said railway company from removing its shops and division point from the city of Napolpa to the city of Tulsa, to approve the removal of said shops and division point, and to ratify the action of said railway company in removing said shops from the said city of Napolpa to the city of Tulsa

Application to the Honorable Corporation Commission of the State of Oklahoma

Comes now the St. Louis San Francisco Railway Company, applicant herein, and respectfully shows to this Honorable Commission as follows:

I

That applicant is a railroad corporation, owning, operating and managing a line of steam railroad in the State of

Oklahoma; that prior to the 19th day of January, 1927, applicant, or its predecessors, had, for a period of about thirty years, maintained machine and repair shops and a division point at the City of Sapulpa, Oklahoma; that a short time subsequent to the 19th day of January, 1927, it removed its said shops and division point from the City of Sapulpa to the City of Tulsa, under the conditions in the application hereinafter described and set forth.

II

That more than thirty years ago the St. Louis & San Francisco Railway Company built and acquired lines of railroad extending from the cities of St. Louis and Kansas City to Afton, Oklahoma, at which point said lines of railroad united and extended in a single line in a southwesterly [illegible] direction into the State of Oklahoma, and the cities of Tulsa and Sapulpa, in said State, and thereafter, said company built lines of railroad extending south from the said City of Sapulpa into the State of Texas to the City of Sherman in said State, and a line of railroad extending east from said City of Sapulpa, through Oklahoma City, Easton and to the City of Ardmore in the State of Texas; that owing to the character of motive power and equipment at said time successfully used by said railroad company, it became and was necessary and convenient in the transaction of the business of said railroad company that division points be located on said railroad at a distance of not to exceed one hundred miles from each other; that owing to the relative size of the different cities through which said lines of railroad passed, and owing to the fact that at the times of the construction of said lines of railroad as hereinbefore described, said railroad company received a large volume of its business from the vicinity of Sapulpa, and owing to the further fact that it appeared to those having to do with the construction of said lines of railroad at said times that the City of Sapulpa would become the business shipping center of its locality, said railroad company located, built and constructed at the said City of Sapulpa certain railroad shops and a division point on said lines of railroad, and that said shops and division point have ever since and until a short time subsequent to the 19th day of

January, 1927, been maintained and operated at said City of Sapulpa.

III

That heretofore and on the 1st day of November, 1916, this applicant became the owner, by purchase, of the above lines of railroad and railroad shops and has since owned and operated same, with the exception of the period of Federal control extending from the 28th day of December, 1917, to the 1st day of March, 1920, during which time said lines were operated and controlled by the United States Government.

[fol. 92] IV

That although from the conditions existing at the time of the construction of said lines of railroad it appeared to those having to do with the construction of same that it would be to the best interest of said railroad and to the shipping public that certain railroad shops used in connection with said lines of railroad and a division point thereon be located at the City of Sapulpa, and that the City of Tulsa would be of minor importance as a railroad and shipping center, conditions have so changed as to make it imperative on the part of the operators of said lines of railroad to locate extensive shops and yards at the City of Tulsa, and at a point therein known as West Tulsa, and remove said division point from the City of Sapulpa to the said City of Tulsa; that at the time of the construction of said lines of railroad, the City of Tulsa was comparatively small, and it appeared to those constructing said lines of railroad that the City of Sapulpa would develop into a large city and an important shipping center, and that Tulsa would remain a comparatively small town and its shipping interests would be of minor importance, but notwithstanding said appearances, the City of Tulsa has developed into a city of approximately [illegible] inhabitants, and has become one of the largest, if not the largest, shipping center in the State of Oklahoma; that applicant now owns and operates, and has, for many years, owned and operated a line of railroad extending in a southwesterly direction from said City of

Tulsa through the cities of Pawnee, Perry and Enid, and that said line of railroad has for many years brought a great volume of freight and passenger business into the City of Tulsa; that immense oil fields and oil properties have been developed and constructed and are being operated in the vicinity of and in all directions from the said City of Tulsa, and the said City of Tulsa has become the center of said operations; that other industries, transacting great volumes of business, have been located and are now being operated in the said City of Tulsa and in the vicinity thereof, and that said industries use the said City of Tulsa as their shipping [fol. 93] center; that the City of Sapulpa has developed only to a very minor degree; that the population of said city at this time is approximately 15,000 people; that very few of the industries operated as hereinbefore set forth, use the City of Sapulpa, or the terminals of said lines of railroad located thereat, as a shipping center.

V

That at the time of the location of said shops and division point heretofore described at the said City of Sapulpa, it appeared to those having to do with the construction and operation of said lines of railroad at said times, that the topography of the ground in the vicinity of said yards and said shops would permit the location and construction thereat of sufficient facilities for the transaction of all shipping business necessary to be transacted at the shops and division point located in that vicinity, but applicant shows to the Commission that owing to the great increase in the volume of business which must be transacted at the shops and division point located at either Tulsa or Sapulpa, and owing to the fact that the shops and yards as heretofore located at said City of Sapulpa were hemmed in by the business houses of the City of Sapulpa on the south of said yard and shops, and by a great hill immediately adjacent to said shops and said yards on the north thereof, and owing to the further fact that said shops and said yards were located on a decided curve in the right of way of applicant at said point, it has been and will continue to be impossible for this applicant to construct at said point sufficient shops and yards to transact the business necessary to be trans-

acted at the division point shops and yards which must be located in said vicinity, or in the vicinity of the City of Tulsa.

VI

That at the time of the construction of said railroad lines, as hereinbefore set forth, owing to the condition of the roadbed, the character of the motive power, engines and other [fol. 94] equipment, it was necessary for the proper conduct of the business transacted by said railroad company, to locate division points and repair shops at points not to exceed one hundred miles from each other, but in recent years the condition of the roadbed, bridges, etc., has been improved to such an extent; the motive power used by those operating said lines of railroad has been increased to such an extent; the engines and other equipment used in the transaction of said business have been enlarged to such an extent, that at this time it is necessary, to the proper conduct of said business, to increase the distances between the division points and repair shops, and it has become and is necessary to remodel the plans of operation of said railroad lines, in that the division points and shops be located much farther apart, and that longer runs be made by crews in charge of said railway company's trains; that in carrying out this necessary scheme, it has become necessary to locate the shops and division point to be located in the vicinity of Sapulpa and Tulsa, at the City of Tulsa.

VII

That this applicant is now and has been at all times mentioned engaged extensively in interstate commerce; that all trains running through the yards and division point described herein are engaged in interstate commerce; that both the switch and road engines used by applicant in and through said yards and shops are constantly engaged in interstate commerce; that there is seldom a train movement made in the vicinity of said shops that has not for its purpose the furtherance of applicant's interstate commerce business; that a large proportion of the shipments hereinbefore mentioned originating at and passing through the City of Tulsa, are shipments destined to points outside of

the State of Oklahoma, or shipments passing through the State of Oklahoma, or shipments from points outside the State of Oklahoma destined to points within the State of Oklahoma; that applicant with its said lines of railroad is engaged in an extensive interstate railroad business, carrying a large volume of commerce, both freight and passenger, from Kansas City, Missouri, and points north and east, to [fol. 95] Tulsa and other points within the State of Oklahoma, and to points south in the State of Texas, and from St. Louis, Missouri, and points north, east and south to Tulsa, and other points within the State of Oklahoma, and points in other states to the south; that the facilities and equipment constituting the shops and division point herein described, are necessary and imperative to the transaction of said interstate business, and are now being, and have been, for a long time, used extensively in the carrying on of said business.

VIII

That those of applicant's officers and managers having to do with the movement of its business, have, after mature consideration and deliberation, decided, and applicant alleges, that it is to the best interest of the shipping public, passengers and those having business with said railroad company, and to the best interests of applicant that its railroad shops and division point heretofore located at the City of Sapulpa, be located at the City of Tulsa, and located therein at a point commonly known as West Tulsa and consolidated with the shops and yards heretofore located at said point. Applicant states that said removal and consolidation has promoted, and will greatly promote, accommodate and aid applicant's intra-state and interstate commerce business.

IX

That the removal of its shops and division point from Sapulpa to Tulsa, a distance of about fourteen miles, and a consolidation of said shops with the shops heretofore located at the City of Tulsa, as hereinabove described, will and has enabled applicant to promote and aid both its intrastate and interstate commerce business by eliminating annually hundreds of thousands of dollars of operating expense; that the removal of said shops and division point

from the City of Sapulpa to the City of Tulsa, as hereinafter described, has been affected at an expenditure of about $150,000.00; that since said removal has been completed, [fol. 96] applicant has been able to show a net average saving by reason of said removal of more than $33,500.00 per month, said monthly savings not including many items which, so far, it has been impossible to reduce to a money basis, but applicant says that when said last named items are computed and reduced to a money basis, the average monthly saving will be far in excess of that above set forth. Applicant further says that it has not, by the removal of its shops and division point from Sapulpa to Tulsa, impaired, in any way, its service to the shipping public at either Sapulpa or Tulsa, but, on the other hand, has greatly improved its service to the public generally.

X

Applicant further shows to this Honorable Commission that prior to the time of the removal of its said shops and division point from Sapulpa to Tulsa, the time had come, and the business of said applicant had reached a point, when the shops and division point as then located at the City of Sapulpa, were entirely inadequate for the transaction of applicant's business, and for the rendition of that adequate service to the public generally demanded and required by this Commission and the Interstate Commerce Commission. Applicant further shows that if said shops had been retained at the City of Sapulpa, it would have meant a current loss of nearly $50,000.00 per month; that it also would have been imperative on applicant's part to have made an expenditure of some three million dollars for repairs and extensions of said shops at Sapulpa, and that even then said shops and yards located thereat could not have been put in condition to have rendered that adequate service which is now being rendered by applicant with its shops and yards located at Tulsa. This for the reason that owing to the curved condition of applicant's right of way at Sapulpa, and owing to the topography of the land in the vicinity of its yards and shops at Sapulpa, it would have been, and is now, [fol. 97] impossible for shops and yards to be constructed and maintained at Sapulpa that will give service equal to that now furnished at the City of Tulsa. Applicant fur-

ther shows that even if other conditions were favorable to extended yards at the City of Sapulpa, it would have been necessary for applicant to purchase additional lands for its yards at said point, thus unnecessarily incurring a great additional expense.

XI

Applicant further shows that the location of its shops at West Tulsa and the vicinity thereof, is entirely sanitary and habitable, there being nothing in the location of said shops and the vicinity thereof that will, in any wise, affect the health of the employes of said railroad company at said new location.

XII

Applicant would further show to this Honorable Commission that during the year 1917, applicant was considering removing its shops and division point from the City of Sapulpa to the City of Tulsa, it being prompted by some of the reasons set forth in this application; that during the month of February, 1917, certain citizens of the City of Sapulpa appeared before this Commission and filed complaint, which had for its purpose the prevention of applicant from removing its shops and division point as herein set forth; that thereafter on the 15th day of February, 1917, order No. 1232 was issued by this Commission, temporarily restraining applicant from removing its shops and division point from the City of Sapulpa to the City of Tulsa, a copy of said order being hereto attached, marked Exhibit "A," and made a part of this application, the same as if herein fully quoted; that during the pendency of said complaint, and after a partial hearing thereon had been had, the Legislature of the State of Oklahoma, during the session of 1917, passed a certain act now known as Sections Nos. 3482, 3483, 3484 and 3485, Compiled Oklahoma Statutes, 1921, said sections becoming effective during the year 1917 by the Governor's returning same to the Legis- [fol. 98] lature without his approval; that thereafter no further action of any character was taken in said cause then pending before this Honorable Commission.

That during the latter part of the year 1926, applicant again manifested its intention of removing at least a por-

tion of its division point from the City of Sapulpa to the City of Tulsa, and thereafter, and on the 29th day of December, 1926, certain citizens of the City of Sapulpa, to-wit: J. F. Lawrence and C. C. Taylor, appearing for themselves and on behalf of the Chamber of Commerce of the City of Sapulpa, and for other citizens of said City, appeared before the Corporation Commission and procured Order No. 3699, from this Honorable Commission which restrained applicant from removing any portion of its division point, or any portion of its shops from the City of Sapulpa to the City of Tulsa, until a hearing could be had thereon by this Commission, said order No. 3699 being hereto attached, marked Exhibit "B," and made a part of this application, the same as if fully quoted herein.

XIII

That thereafter, and on the 11th day of January, 1927, applicant filed its bill in equity in the Federal Court in and for the Northern District of the State of Oklahoma, setting forth the necessity for the removal of said shops and division point, describing the great and irreparable loss that applicant would incur if prevented from making such removal, showing that said removal was a matter that materially affected interstate commerce and was a matter materially affecting the management of the interstate commerce business of said railroad, and alleging that the statutes of the State of Oklahoma heretofore referred to, same being Sections Nos. 3482, 3483, 3484, and 3485, upon which the orders of this Commission heretofore described were based, were void and deprived applicant of rights guaranteed by the Constitution of the United States, and deprived it of its property without due process of law, and the equal [fol. 99] protection of law, as guaranteed to it by said Federal Constitution; that said statutes were discriminatory and also had the effect of regulating and burdening interstate commerce, and were an unconstitutional, arbitrary and unnecessary exercise of police power. In said bill, applicant prayed that the citizens of Sapulpa, the Attorney General of the State of Oklahoma, and members of this Commission, be enjoined from taking any action having for its purpose the prevention of said removal.

XIV

After the filing of the above mentioned bill in equity with the Federal Court, the Honorable Franklin E. Kennamer, Judge of said court, issued his restraining order, restraining said citizens of Sapulpa, Edwin Dabney, Attorney General of the State of Oklahoma, and the members of this Honorable Commission, from taking further action in any of the matters then pending before said Commission relative to the removal of said shops, until a hearing could be had in said Federal Court; also restraining applicant from removing its shops or division point, or any part thereof from the City of Sapulpa, until said hearing, a copy of said temporary restraining order is hereto attached, marked Exhibit "C," and made a part of this application, the same as if fully quoted herein.

That thereafter and on the 19th day of January, 1927, a hearing was had before the Honorable Arba S. Van Valkenburgh, Circuit Judge for the Eighth Circuit, and the Honorable Albert L. Reeves, District Judge, and the Honorable Franklin E. Kennamer, District Judge, on applicant's application for a temporary injunction, enjoining the parties above mentioned from, in any manner, interfering with its removal of its said shops and division point, and enjoining this Commission from retaining jurisdiction of said matter under the above named statutes, and at the conclusion of said hearing an order was made by said court granting applicant's prayer in the premises, and an order of tem [fol. 100] porary injunction was made by said court, a copy of which is heretofore attached, marked Exhibit "D," and made a part hereof, the same as if fully quoted herein.

XV

Thereafter, the defendants in said cause in equity appealed to the United States Supreme Court from the action of said District Court in granting said temporary injunction, but did not supersede the effect of said order; that during the pendency of said appeal in the United States Supreme Court, and during a time when said temporary injunction was in full force and effect, and after defendants in said cause had failed to supersede same, and after the United States District Court for the Northern

District of Oklahoma, composed of the three judges as aforesaid, had held that said statutes were unconstitutional and void, your applicant, in good faith, believing that said unsuperseded judgment would become final, and believing, as it yet believes, that said statutes were unconstitutional and void and extended to this Honorable Commission no jurisdiction of the matters involved herein, and in order to effect the great reduction in expense, as herein described, and in order that it might render much more adequate service to the public, removed its said shops and division point from the City of Sapulpa to the City of Tulsa, and thereby effected the great saving and increased its efficiency in service, as hereinbefore set forth in this application.

XVI

Your applicant would further show to this Honorable Commission that thereafter and on the 30th day of May, 1927, the United States Supreme Court reversed the judgment of the United States District Court for the Northern District of Oklahoma, and dissolved said temporary restraining order, holding that the evidence introduced at the hearing before said trial court was insufficient to show that danger of irreparable injury to your applicant which would justify the granting of the interlocutory order, but spe- [fol. 101] cifically reserving the question as to the constitutionality of said statutes. In said opinion, however, said United States Supreme Court indicated its desire to adhere to demands of comity and courtesy between Federal and State Governments where that could be done without irreparable damage, injury and sacrifice, and also indicated that before final hearing in said United States District Court, an application should be made to this Honorable Commission in the premises.

XVII

Applicant further shows to this Honorable Commission that on the 22d day of October, 1927, the United States District Court of the Northern District of Oklahoma, composed of the Honorable Arba S. Van Valkenburgh, Circuit Judge of the Eighth District, Albert L. Reeves, District Judge, and Franklin E. Kennamer, District Judge, made an order

directing that applicant come before this Commission as a preliminary step to the further hearing of said cause, and ask that the Commission dissolve its former orders enjoining the removal of said shops and division point, and permit same to be moved, and ratify the action of this applicant in so removing its shops and division point as above set forth. A copy of said order so made by said court is hereto attached, marked Exhibit "E," and made a part of this application, the same as if fully quoted herein.

XVIII

Applicant would further show to the Commission that it has removed its shops and division point from the City of Sapulpa to the City of Tulsa, in good faith, believing, as it had a right to believe, that it was justified in so removing same under the unsuperseded judgment of the United States District Court for the Northern District of Oklahoma; that it has by such action made a saving of more than $33,500.00 per month during such removal; that it is rendering a better service to the public in general since said removal that is was possible for it to render with its said shops and division point at the City of Sapulpa; that the [fol. 102] service of the business originating at Sapulpa has been in no manner impaired; that for applicant to again remove its shops and division point from the City of Tulsa to the City of Sapulpa, would mean a cash expenditure of more than $300,000.00, a current monthly loss of more than $33,500.00, and a great impairment of its service to the passenger and shipping public, as hereinbefore described.

Wherefore, premises considered, applicant prays that its application be set down for hearing at the earliest practicable moment and that notices issue to J. F. Lawrence, Tulsa, Oklahoma, C. C. Taylor, Sapulpa, Oklahoma, and Edwin Dabney, Attorney General of the State of Oklahoma, defendants in equity cause No. 207, pending in the United States District Court for the Northern District of Oklahoma, and to the City of Sapulpa, and that said notices be served on all said parties not less than ten days before the date set for said hearing.

Applicant further prays that on final hearing, this Honorable Commission set aside its orders heretofore made

preventing and restraining applicant from removing its shops and division point, or any part thereof, from the City of Sapulpa to the City of Tulsa, and that said removal be approved, and that this Honorable Commission ratify the action of applicant in removing its said shops and division point from the City of Sapulpa to the City of Tulsa, as hereinbefore set forth and described.

Applicant further prays for all other relief, general and special, to which it may be, in the premises, entitled at the hands of this Commission.

E. T. Miller, C. B. Stuart, Cruce & Franklin, Attorneys for Applicant.

[fol. 103] Before the Corporation Commission of the State of Oklahoma

Cause No. 2812

J. F. Lawrence and C. C. Taylor, Complainants,

vs.

St. Louis San Francisco Railway Company, Defendant

(Exhibit A)

Order No. 1232

This cause came on to be heard on this 5th day of February, 1917, upon the complaint of the complainants and their application for temporary order and the same being considered by the commission, it is ordered that said cause be set down for hearing in the District Court room at Sapulpa, Oklahoma, at ten o'clock A. M., on February 19, 1917; that notice be given the defendant as provided by law and that in the meantime the said defendant and all its officers, agents and employes, until the further order of the commission, be, and they are hereby, prohibited from moving the division point and shops of said Railway Company or either or any of them which are now located at Sapulpa, Oklahoma, from their present location.

It is further ordered that a copy of this order be served on the defendant.

Done at Oklahoma City, Oklahoma, on this the 5th day of February, 1917.

Corporation Commission of Oklahoma. (Signed by the Commission) by ——, Chairman. ——, Commissioner.

[fol. 1184] Before the Corporation Commission of the State of Oklahoma

Cause No. 2812

J. F. Lawrence and C. C. Eaton, Complainants,

vs.

St. Louis-San Francisco Railway Company, Defendant

(Exhibit B)

Order No. 3089

This cause coming on to be heard on this 29th day of December, 1926, upon motion of the complainants, and it appearing that the defendant is taking steps toward the removal of its shops and division point from the City of Sapulpa in violation of the order of this Commission entered on the 5th day of February, 1917, and in violation of the Act of the Legislature passed in 1917, it is ordered by the Commission that said cause be set down for hearing on the 17th day of January, 1927, and that in the meantime, and until the further order of the Commission, the defendant be, and it is hereby prohibited from moving its shops or division point from the City of Sapulpa, from changing the runs of either its passenger or freight trains, or from taking any other steps towards changing its division point for either passenger or freight service from the said City of Sapulpa.

It is further ordered that a copy of this order be served on the defendant.

Done at Oklahoma City, Oklahoma, on the date first above named.

Corporation Commission of Oklahoma, by Fred Caughey, Chairman. W. C. Carter, Commissioner.

Attest: E. D. Graham, Acting Secretary.

[Ed. 96] In the District Court of the United States for the Northern District of Oklahoma

No. 96, Equity

St. Louis-San Francisco Railway Company, Plaintiff,

vs.

J. B. Lawrence, C. C. Taylor, Elbert Bellatt, Attorney General of the State of Oklahoma; Fred C. Gipson, Fred Gipson, and C. C. Childs, Individual and as Members of the Corporation Commission of the State of Oklahoma, Defendants

(Exhibit C)

Temporary Restraining Order

This matter coming on for hearing before the Honorable Franklin E. Kennamer, Judge of the United States District Court for the Northern District of the State of Oklahoma, upon the verified petition of the plaintiff, St. Louis-San Francisco Railway Company, and it appearing to the court that the plaintiff, upon the facts alleged in said petition, is entitled to the relief prayed for, and that the said J. B. Lawrence, C. C. Taylor, Elbert Bellatt, Attorney General of the State of Oklahoma, Fred C. Gipson, Fred Gipson and C. C. Childs, individually, and as members of the Corporation Commission of the State of Oklahoma, should be enjoined and restrained until further order of this Court, from proceeding further in a certain action pending before the Corporation Commission of the State of Oklahoma, wherein the said J. B. Lawrence and C. C. Taylor are complainants, and the St. Louis-San Francisco Railway Company is defendant, and causing bearing Corporation Commission's No. [96], which said action has [Ed. 96] for its purpose the prevention on the part of the St. Louis-San Francisco Railway Company from removing its shops and division point from the City of Sapulpa, and from putting into effect certain changes in the time of its interstate passenger trains, according to a schedule about to be put into effect by said Railway Company;

Wherefore, it is ordered and adjudged that said defendants, J. B. Lawrence, C. C. Taylor, Elbert Bellatt, Attorney

[Ed. Note] In the District Court of the United States for the Northern District of Oklahoma

No. 287, Equity

C. Lucas Sun Pleasure Manor Company, Plaintiff,

vs.

J. B. Lawrence, C. C. Taylor, Davis Deuce, Attorney General of the State of Oklahoma; Frank C. Carter, Fred C. Squire, and C. C. Childers, Individually and as Members of the Corporation Commission of the State of Oklahoma, Defendants

(Exhibit D)

Temporary Injunction

This matter coming on for hearing on plaintiff's application for a temporary injunction on this 19th day of January, 1927, before the Honorable Arba S. Van Valkenburgh, Circuit Judge for the eighth Circuit, and the Honorable Albert L. Reeves, District Judge, and the Honorable Franklin E. Kennamer, District Judge, pursuant to the order heretofore on the 11th day of January, 1927, made by the Honorable Franklin E. Kennamer, District Judge, granting a temporary restraining order herein, and the plaintiff appearing by its attorneys, Monnet, Green and Franklin, and the defendants appearing by their attorneys, Judge C. B. Ames, Honorable S. Taylor, and W. L. Blakemore, and all parties having announced ready for hearing, said matter was by agreement submitted on affidavits introduced in evidence by both plaintiff and defendants, and the court having considered said affidavits and having heard argument of counsel both for plaintiff and defendants, and the court having considered said affidavits and having heard argument of counsel both for plaintiff and defendants, is of the opinion that the [Ed. Note] temporary injunction prayed for by plaintiff herein should be in all things granted, and that the defendants, J. B. Lawrence, C. C. Taylor, Edwin Nelson, Attorney General of the State of Oklahoma, Frank C. Carter, Fred C. Squire and C. C. Childers, individually and as

members of the Corporation Commission of the State of Oklahoma, and all persons similarly situated, and all persons acting with or by the authority of any said defendants, should be enjoined until further order of this court from proceeding further in a certain action pending before the Corporation Commission of the State of Oklahoma wherein the said J. F. Lawrence and C. C. Taylor are complainants and the St. Louis-San Francisco Railway Company is defendant, said cause being cause No. 2812 of the Corporation Commission of the State of Oklahoma, which said action has for its purpose the prevention on the part of the said St. St. Louis-San Francisco Railway Company from removing its shops and division point from the City of Sapulpa and from putting into effect certain changes in the runs of its trains according to its schedule about to be put into effect by said railway company.

Wherefore, it is ordered, adjudged and decreed that said defendants, J. F. Lawrence, C. C. Taylor, Edwin Dabney, Attorney General of the State of Oklahoma, Frank C. Carter, Fred Clapshaw and C. C. Childers, individually and as members of the Corporation Commission of the State of Oklahoma, and all persons similarly situated, and all persons acting with them, their agents, servants, employees and all persons acting by or under their authority or the authority of any of them, and all persons for whom the said J. F. Lawrence and C. C. Taylor appeared in the said above described cause so pending before the Corporation Commission of the State of Oklahoma, be and all of them are hereby enjoined and restrained from prosecuting, hearing, or conducting or permitting a hearing to be had, or [fol. 110] taking or permitting any further proceedings to be had in the above described cause of action now pending before the Corporation Commission; that said defendants, and each and all of them, are hereby further restrained and enjoined from making, promulgating or enforcing, or causing to be made, promulgated or enforced, any order prohibiting the above named plaintiff from removing any of its shops or appurtenances thereto, its division point or any part thereof, or from changing the run of any of the crews on said trains now in said schedule, or doing anything that will in any manner interfere with or prohibit plaintiff from

removing its shops or any appurtenances thereto, or its division point or any part thereof, or in changing the run of any of its trains until the further order of this court.

It is the further order of this court that no proceedings had herein or by the Corporation Commission of the State of Oklahoma, or any order heretofore issued by said Corporation Commission, shall in any event prohibit plaintiff from putting into effect on the 23rd day of January, 1927, its train schedule above referred to herein.

This order is to become effective upon the filing by the plaintiff and the approval thereof of the Clerk of this Court of a bond properly conditioned according to law in the sum of $50,000.00.

Arba S. Van Valkenburgh, United States Circuit Judge. Albert L. Reeves, United States District Judge. F. E. Kennamer, United States District Judge.

[fol. 111] In the District Court of the United States for the Northern District of Oklahoma

No. 207, Equity

St. Louis San Francisco Railway Company, Plaintiff,

vs.

J. F. Lawrence, C. C. Taylor, Edwin Darney, Attorney General of the State of Oklahoma; Frank C. Carter, Fred Capshaw, and C. C. Childers, Individually and as Members of the Corporation Commission of the State of Oklahoma, Defendants

(Exhibit E)

Order Directing Plaintiff to Make Certain Application to the Corporation Commission of the State of Oklahoma

Now on this 22nd day of October, 1927, the above matter being regularly before the court, and the plaintiff appearing by its attorneys, E. T. Miller, C. B. Stuart and Cruce & Franklin, and the defendants appearing by their attorneys,

C. B. Ames, and T. L. Blakemore, and the court having heard the argument and contention of counsel for both plaintiff and defendants, and having considered the opinion of the Supreme Court of the United States rendered in this case, is of the opinion that before further steps looking to a final hearing of this cause are taken, that said plaintiff should make application to the Corporation Commission of the State of Oklahoma, to dissolve its restraining orders heretofore made, restraining said plaintiff, from removing its shops and division point from the City of Sapulpa to the City of Tulsa, and to ratify the action of said road in removing its said shops and division point during the pendency of this cause, and it further appearing to the court that the United States Supreme Court in its opinion ren- [fol. 112] dered in this cause, has plainly indicated that it is its desire to adhere to the mandate of the state law wherever that can be done without irreparable damage, injury or sacrifice, and it further appearing to this court that application as directed herein may be made to the Corporation Commission of the State of Oklahoma, by plaintiff, without its surrendering any of its alleged rights prayed for in its complaint filed herein, and that the application hereinafter directed may be made by said plaintiff without this court surrendering its jurisdiction of this cause;

It is, therefore, ordered that plaintiff, as a preliminary step to further hearing of this cause, and without unnecessary delay, and in good faith, make application to the Corporation Commission of the State of Oklahoma, to dissolve its restraining orders heretofore made by it, restraining said plaintiff from removing its shops and division point, or any part thereof, from the City of Sapulpa to the City of Tulsa, and to ratify the action of said plaintiff in the removal of its said shops and division point from the City of Sapulpa to the City of Tulsa, which has been effected during the pendency of this cause in this court.

It is further ordered that unless otherwise ordered by this Court, final hearing of this cause be suspended until the result of said application to the Corporation Commission be ascertained, and it is further ordered that this court shall and will retain jurisdiction of this cause so that any action, order or judgment may be taken or made by this

court that may be necessary to protect the rights of any parties hereto.

Arba S. Van Valkenburgh, United States Circuit Judge. Albert L. Reeves, United States District Judge. Franklin E. Kennamer, United States District Judge.

[fol. 113] Exhibit "B" to Supplemental Complaint

Before the Corporation Commission of the State of Oklahoma

Cause No. 2812

J. F. Lawrence and C. C. Taylor, Complainants,

vs.

St. Louis-San Francisco Railway Company, Defendant

In re application of the St. Louis-San Francisco Railway Company to said Commission to set aside its restraining orders heretofore made restraining said railway company from removing its shops and division point from the city of Sapulpa to the city of Tulsa, to approve the removal of said shops and division point, and to ratify the action of said railway company in removing said shops from the said city of Sapulpa to the city of Tulsa

Objection of the Complainants and Others to the Hearing of said Application Unless the St. Louis-San Francisco Railway Company Purges Itself of Contempt by Returning Its Shops and Division Point to the City of Sapulpa

Come now the complainants in said cause, and also the City of Sapulpa and the Chamber of Commerce of the City of Sapulpa on behalf of the inhabitants of said city, and object to the hearing of the aforesaid application of the St. Louis-San Francisco Railway Company unless and until the said railway company purges itself of contempt by returning its shops and division point to the City of Sapulpa, and in support of their objections respectfully show to the Commission that by Order No. 1232, entered in this cause

on the 5th day of February, 1917, said railway company was ordered not to move its division point and shops, or either or any of them, which were then located at Sapulpa, Okla- [fol. 114] homa, from their present location until the further order of the Commission; that again in said cause, by Order No. 3639 entered on the 29th day of December, 1926, the said railway company was ordered by the Commission not to move its shops or division point from the City of Sapulpa until the further order of the Commission, and said cause was set down for hearing on the 17th day of January, 1927.

That thereafter, on the 11th day of January, 1927, said railway company obtained a temporary restraining order from the United States District Court of the Northern District of Oklahoma, restraining this Commission, the Attorney General of the State, and the complainants in this cause, from further proceedings, and on the 19th day of January, 1927, obtained a temporary injunction from the said United States District Court restraining this Commission, the Attorney General of the State, and the complainants in this cause, and all other persons similarly situated, from proceeding further and from taking any steps towards enforcing the orders of this Commission; that the defendants in said cause pending in the said United States District Court immediately took an appeal to the Supreme Court of the United States, and while said appeal was pending the said railway company hurriedly moved its shops and division point from Sapulpa to West Tulsa; that the Supreme Court of the United States, on the 30th day of May, 1927, reversed the order of the said District Court granting the temporary injunction, and remanded the cause for further proceedings; that when the mandate was filed in the said District Court said Attorney General of the State, and the said J. F. Lawrence and C. C. Taylor filed a motion in the said United States District Court to require the said railway company to return its shops and division point to the City of Sapulpa; that said motion was submitted to the United States District Court on the 22nd day of October, 1927, and said court, with three judges sitting, took said motion under advisement and the same has not yet been decided by the said United States District Court. A copy of the [fol. 115] order made by the United States District Court

at said time is hereunto attached, marked Exhibit "A", and referred to as a part of these objections.

These objectors, therefore, respectfully show to the Commission that the said railway company has flagrantly and defiantly violated both orders heretofore rendered by this Commission, and the statute of the State of Oklahoma applicable to such cases, and that said railway company in the present application does not offer to restore its shops and division point to Sapulpa under any contingencies, even though the present application should be denied.

Because said railway company is in contempt of this Commission, and does not in any way offer to purge itself of said contempt, these objectors respectfully object to its application being heard by this Commission unless it restores its shops and division point to the City of Sapulpa, or in good faith offers to do so in the event this Commission denies its application and orders the railway company to return its shops and division point to the City of Sapulpa.

J. F. Lawrence, C. C. Taylor, City of Sapulpa, Oklahoma, Chamber of Commerce of the City of Sapulpa, Oklahoma, by C. B. Ames, T. L. Blakemore, their Attorneys.

[fol. 116] In the District Court of the United States for the Northern District of Oklahoma

Equity. No. 207

St. Louis-San Francisco Railway Company, Plaintiff,

vs.

J. F. Lawrence et al., Defendants

(Exhibit A)

Order

This cause came on to be heard on the 22nd day of October, 1927, upon the motion of J. F. Lawrence, C. C. Taylor, and Edwin Dabney, Attorney General, to require the plaintiff in said cause to restore the status quo existing at and before the temporary injunction was granted by returning the shops and division point to Sapulpa. The plaintiff ap-

peared by its attorneys, E. T. Miller, C. B. Stuart and Cruce & Franklin, and the moving defendants appeared by their attorneys, C. B. Ames, T. L. Blakemore and C. J. Davenport. When the court convened there was sitting Hon. Arba S. Van Valkenburgh, Circuit Judge, Hon. Albert L. Reeves, District Judge, and Hon. F. E. Kennamer, District Judge and the Judge of said court. Thereupon, the moving defendants objected to three judges sitting in said cause on the ground that their motion to require restitution did not require or permit the presence of three judges under Sec. 380 of the United States Code, or any other provision of law. Upon this motion being presented and argued it was overruled by the court composed of three judges, as aforesaid. Thereupon, the moving defendants presented an application to the Honorable F. E. Kennamer, Judge [fol. 117] of said court, praying that he sit alone and, as Judge of said court, hear their motion, and this motion was overruled by the Hon. F. E. Kennamer, District Judge.

Thereupon, the aforesaid motion to require restitution was presented to the court composed of three judges, and after argument of counsel the court took said motion under advisement, but retained jurisdiction of said cause.

Arba S. Van Valkenburgh, Circuit Judge. Albert L. Reeves, District Judge. F. E. Kennamer, District Judge.

O. K. ——— ———, Attorneys for Plaintiff. ———, Attorneys for Defendants.

[fol. 118] Exhibit "C" to Supplemental Complaint

Before the Corporation Commission of the State of Oklahoma

Cause No. 2812. Order No. 40331/2

J. F. Lawrence and C. C. Taylor, Complainants,

vs.

St. Louis San Francisco Railway Company, Defendant

In re Application of the St. Louis-San Francisco Railway Co. to said Commission to set aside its restraining orders heretofore made restraining said railway company from

removing its shops and division point from the city of Sapulpa to the city of Tulsa, to approve the removal of said shops and division point, and to ratify the action of said railway company in removing said shops from the said city of Sapulpa to the city of Tulsa

Order

This cause came on to be heard before the Commission on the 5th day of December, 1927, upon the objections of the complainants and the city of Sapulpa and the Chamber of Commerce of the city of Sapulpa to a hearing at this time of the above mentioned application of the St. Louis-San Francisco Railway Company, and it appearing to the Commission that the St. Louis San Francisco Railway Company has heretofore moved its shops and division point from the city of Sapulpa to the city of West Tulsa, under a claim that said removal was affected under and by virtue of an order issuing out of the Federal Court in and for the Northern District of Oklahoma, enjoining the complainants, this Commission and the Attorney General of the State of Oklahoma from enforcing the orders of this Commission and the statutes of Oklahoma hereinafter mentioned, and under the further claim that the Honorable Federal Court of the Northern District of Oklahoma, did, on the 22d day of October, 1927, while it had jurisdiction of the cause, and while still retaining jurisdiction for final hearing, make an order that the defendant herein appear before this Commission and seek its approval of the defendant's removal of the shops and division point as herein mentioned, and it appearing to the Commission that notwithstanding said [fol. 119] claim, said removal was in violation of Order No. 1232 entered in this cause on the 5th day of February, 1917; in violation of Order No. 3699 entered in this cause on the 29th day of December, 1926, and in violation of the statutes of the State of Oklahoma, and it appearing that said Railway Company has not moved and returned its shops and division point to the city of Sapulpa, or offered to do so;

It is, therefore, ordered by the Commission that the objections of the complainants, the City of Sapulpa, and the Chamber of Commerce of the city of Sapulpa, be and they are hereby sustained, and the Commission declines to hear

the application of the St. Louis San Francisco Railway Company, aforesaid, until the said Railway Company has returned its shops and division point from the city of West Tulsa to the City of Sapulpa.

Ordered, adjudged and decreed this the 5th day of December, 1927.

Corporation Commission of Oklahoma, Fred Capshaw, Chairman. F. C. Carter, Commissioner. C. C. Childers, Commissioner.

Attest: E. D. Hicks, Jr., Acting Secretary.

[File endorsement omitted.]

[fol. 120] In United States District Court

[Title omitted]

Motion to Dismiss—Filed January 17, 1928

Come now the defendants in said cause and move the court to dismiss the bill of complaint, and supplemental bill of complaint, for the reason that said bill and supplemental bill do not state facts sufficient to constitute a cause of action against the defendants, or to entitle the complainant to equitable relief.

Edwin Dabney, Attorney General, Attorney for Members of the Corporation Commission and the Attorney General. C. B. Ames, C. J. Davenport, F. L. Blakemore, Attorneys for the Remaining Defendants. ——— ———, of Counsel.

[File endorsement omitted.]

[fol. 121] In United States District Court

[Title omitted]

Decree—Filed March 12, 1928

This matter came on for hearing on defendants' motion to dismiss, complainant's original and supplemental bills,

before the Honorable Aria S. Van Valkenburgh, Circuit Judge for the Eighth Judicial Circuit, and the Honorable Albert L. Reeves, District Judge, and the Honorable Franklin E. Kennamer, District Judge, duly convened under section 266 of the Judicial Code of the United States as amended, the plaintiff appearing by Mr. C. B. Stuart and Mr. Ben Franklin, its attorneys, and defendants appearing by Mr. T. L. Blakemore and Mr. D. A. McDougall, their attorneys, and all parties having announced ready for hear-
[fol. 122] ing, and having announced to the court that the case was submitted for final decree upon the motion to dismiss, without further pleadings or other procedure, and the court having heard the arguments of counsel, having examined the pleadings and authorities submitted, and being well advised in the premises, doth find that the bills of complaint state facts sufficient to constitute a cause of action against the defendant and to entitle complainant to equitable relief; and the motion to dismiss should be and is overruled, to which ruling an exception is allowed to defendants.

The court further finds that plaintiff is entitled to remove its shops and division point from Sapulpa to West Tulsa, in the State of Oklahoma, upon the grounds and for the reasons stated in its said bills of complaint; that to deprive complainant of this right would cause great and irreparable loss to complainant and serious inconvenience to the traveling and shipping public; that the Corporation Commission of Oklahoma is without authority, in the situation here presented, to prevent such removal, and that such action on its part would, in the instant case, constitute a burden upon interstate commerce.

[fol. 123] It is therefore considered, adjudged, and decreed that the injunction and relief prayed for by plaintiff herein should be in all things granted and that the defendants, J. F. Lawrence, C. C. Taylor, Edwin Dabney, Attorney General of the State of Oklahoma, Frank C. Carter, Fred Capshaw and C. C. Childers, individually, and as members of the Corporation Commissioner of the State of Oklahoma, and all persons similarly situated, and all persons acting with or by the authority of any of said defendants, or as their successors, should be perpetually enjoined from proceeding further in a certain action pending before the Corporation Commission of the State of Oklahoma, wherein

the said J. F. Lawrence and C. C. Taylor as complainants and the St. Louis San Francisco Railway Company as defendant, said cause being numbered 2827 of the Corporation Commission of the State of Oklahoma, which said action has as its purpose the prevention of the said St. Louis San Francisco Railway Company from removing its shops and division point from the City of Sapulpa, and from putting into effect certain changes in the movements of its trains according to the schedule put into effect by said Railway Company,

[fol. 124] It is further ordered, adjudged, and decreed that said defendants, J. F. Lawrence, C. C. Taylor, Edgar Rahmy, Attorney General of the State of Oklahoma, Fred C. Taylor, Fred Sharp and C. C. Hiller, individually, and as members of the Corporation Commission of the State of Oklahoma, and all persons similarly situated, and all persons acting with them, their agents, servants, employees and successors, and all persons acting by or under their authority, or the authority of any of them, and all persons for whom the said J. F. Lawrence and C. C. Taylor appear in the said above described cause, as pending before the Corporation Commission of the State of Oklahoma, be and all of them are hereby enjoined and restrained from proceeding, hearing or conducting, or permitting a hearing to be had, or taking or permitting any further proceedings in the above described cause of action now pending before the Corporation Commission, or any action of like nature; that said defendants, and each of them, are hereby further restricted and enjoined from ever, promulgating or enforcing, or causing to be made, promulgated or enforced, any order prohibiting the above named plaintiff from removing any of its shops or appurtenances thereto, its division [fol. 125] point or any part thereof, or from changing the run of any of its trains named in the schedule above referred to or from changing the run of any of the crews on said trains now in said schedule, or doing anything that will in any manner interfere with or prohibit plaintiff from removing its shops, or any appurtenances thereto, or its division point, or any part thereof, or in changing the run of any of its trains, or from interfering in any manner with the removal of said shops and division point as already

made; that all costs accruing in said action except such costs and expenses as have already been adjudged and taxed in favor of defendants be taxed to the plaintiff in the temporary injunction in this case, shall be taxed against the defendants herein, and that plaintiff shall have execution therefor.

Tulsa, Oklahoma, March 11, 1926.

Kirk W. Van Valkenburgh, Circuit Judge. Oliver S. Kennedy, District Judge. F. E. Kennamer, District Judge.

[Title omitted.]

[Title omitted.]

Mr. C. B. Stuart and Mr. Ben Franklin, (Mess. Elvin Bellatti, Attorney General, Mr. E. T. Miller and Mr. S. H. Cline of counsel) for complainant.

Mr. T. L. Blakemore and Mr. D. A. McDonald, (Messrs. Jones, Kane & Graham of counsel) for respondents.

Before Van Valkenburgh, Circuit Judge, and Kennedy and Kennamer, District Judges.

Memorandum Opinion on Motion to Dismiss.

Van Valkenburgh, Circuit Judge.

It appears from the bill of complaint that more than thirty years ago the St. Louis-San Francisco Railway Company built and acquired lines of railroad extending from Enid [illegible] the cities of St. Louis and Kansas City, in the State of Missouri, to Tulsa, in the State of Oklahoma, at which point said lines of railroad united and extended in a single line in a southwesterly direction into the State of Oklahoma and the cities of Tulsa and Sapulpa in said State, and thereafter there were built lines of railroad extending south from said City of Sapulpa into the State of Texas to the City of Wichita in said State, and also a line of railroad extending west from said City of Sapulpa through

Oklahoma City, Lawton and to the City of Quanah in the State of Texas; that owing to the fact that at the times of the construction of said lines of railroad complainant herein received a large volume of its business from the vicinity of the City of Sapulpa, and owing to the further fact that it appeared to those having to do with the construction of said lines of railroad at said times that the City of Sapulpa would become the business shipping center of its locality, complainant located, built and constructed at the said City of Sapulpa certain railroad shops and a division point on said lines of railroad, and that said shops and division point have been maintained and operated at the said City of Sapulpa up to the time this suit was filed; that on the first day of November, 1916, complainant became the owner by purchase of the above named lines of railroad and railroad shops, and has since owned and operated the same; that during the month of February, 1917, defendants J. F. [fol. 128] Lawrence and C. C. Taylor, appearing on behalf of themselves, the Chamber of Commerce of the City of Sapulpa, and the citizens of said city, filed complaint with the Corporation Commission of the State of Oklahoma, for the purpose of preventing complainant from moving its said shops and division point from the City of Sapulpa to the City of Tulsa on its line of railroad; that thereafter, on the 15th day of February, 1917, the Corporation Commission of the State of Oklahoma issued its order temporarily restraining complainant from moving its said shops or division point as aforesaid. A partial hearing was had on this complaint and an adjournment taken. During that adjournment, in 1917, the Legislature of the State of Oklahoma passed the following Act, now found as sections 3482, 3483, 3484 and 3485 of the Compiled Oklahoma Statutes of 1921:

"3482. That no person, receiver, firm, company or corporation owning, operating or managing any line of steam railroad in this State shall be allowed to remove railroad shops or division points which have been located at any place in this state for a period of not less than five years without previously securing the permission of the Corporation Commission to make such removal.

"3483. If, and when any such person, receiver, firm, company or corporation desires to remove any such railroad

shops or division point described in Section One of this Act, it shall be his duty to file an application with the Corporation Commission setting forth the present location of such shops or division point and the reasons for such removal, and thereupon the Corporation Commission shall have full power and jurisdiction to entertain such complaint, but before hearing the same or making any order permitting such removal to be made, said cause shall be set down for hearing, not less than ten days' notice shall be given the city, town or village in which or at which such shops or division point have been maintained, and after giving all parties interested a full and complete hearing in the premises the Commission may in its discretion permit or refuse such request for a removal.

[fol. 129] "3484. When an application is filed before the Commission for the removal of terminals or car shops, as provided in Section Two, the Commission shall hear evidence on the relative efficiency and expense of handling traffic through the proposed terminal as compared with the present facilities, and shall consider all other facts and circumstances affecting the various interests involved. In determining the adequacy of the present facilities the Commission shall consider the same increased by an expenditure equal to an amount necessary to remove the same to the proposed location or an amount equal to the necessary expenditure to establish such facilities at the new location. It is hereby further provided that the Commission shall hear evidence and shall make a finding of fact as to the sanitary and habitable conditions of the proposed location with reference to whether the same would endanger the health of the employes of the applicant or the health of their families. If the Commission should find that the sanitary or habitable conditions at the proposed location of said terminal facilities would endanger or injuriously affect the health of the employes of said applicant or their families, the Commission shall deny said application and order the said terminal facilities and car shops to remain at the present location.

"3485. On any such hearing, as provided in this act, the presumption shall be against the removal and the burden of proof rest upon the applicant to show that such removal ought to be made."

Thereafter, no proceedings of any kind were had. It does not appear that any effort was made on the part of complainant to move its shops, if such had been contemplated.

The bill of complaint states further that conditions have so changed as to make it imperative on the part of the operators of said lines of railroad to locate extensive shops and yards at the City of Tulsa, and at a point therein known as West Tulsa, and to move said division point from the City of Sapulpa to the said City of Tulsa; that the latter city has developed into a city of approximately 125,000 inhabitants, and has become one of the largest, shipping cen- [fol. 130] ters in the State of Oklahoma; that immense oil fields and oil properties have been developed and constructed and are being operated in the vicinity of and in all directions from the City of Tulsa, which has become the center of such operations; that other industries, transacting great volumes of business have been located, and are now being located, in said city, and in the vicinity thereof, and use said city as their shipping center; that the City of Sapulpa has developed only to a very minor degree, the population being stated at approximately 20,000 people; that very few of the industries operated, as hereinbefore set forth, use Sapulpa, or the terminals there located, as a shipping center; that the topography of the ground in the vicinity of the Sapulpa yards and shops will not permit the location and construction of sufficient facilities for the transaction of the shipping business necessary to be transacted at the shops and division point located in that vicinity; that it has been, and will continue to be, impossible for complainant to construct at Sapulpa sufficient shops and yards to transact its necessary business; that because of improved conditions of roadbed, bridges, etc., the increase of motive power and the enlargement of engines and other equipment, it is now necessary to the proper conduct of business of complainant, as an interstate carrier, to increase the distances between its division points and large [fol. 131] shops; that complainant is engaged extensively in interstate commerce, carrying a large volume of such commerce, both freight and passenger, from Kansas City, Missouri, and points north and east, to Tulsa and other points within the State of Oklahoma, and to points south in

the State of Texas, and from St. Louis, Missouri, and points north, east and south, to Tulsa and other points within the State of Oklahoma, and other states to the south; that the facilities and equipment, constituting the shops and division point herein described, are necessary and imperative to the transaction of its said interstate business; that a removal of its shops and division point to Tulsa, and a consolidation of said shops with the shops now located at Tulsa, will enable complainant to promote and aid its interstate commerce business by eliminating annually hundreds of thousands of dollars of operating expense; that among many other items it will be able to save in wages of employees approximately $200,000 per annum; in operating material and equipment, approximately $70,000 per annum; in fuel, power and lights, approximately $25,000 per annum; that owing to the fact that it has been necessary for complainant to construct and maintain extensive shops and yards at Tulsa, in addition to the shops and yards at Sapulpa, if complainant is prevented from removing its said shops from Sapulpa to Tulsa, it will be necessary for complainant to maintain and operate, at great expense and loss, two extensive sets of shops and yards within eighteen miles of each other, thus entailing great addition and needless cost and expense, resulting in great confusion and congestion [fol. 132] of traffic, causing loss of time to shipments, and thus interfering with and placing a direct burden upon interstate commerce business; that in the proper conduct and operation of its railroad it becomes necessary from time to time for complainant to readjust its division points and to find better and more efficient, suitable and convenient places for repair work and for keeping its rolling stock and other instrumentalities of its railway used in interstate commerce in proper condition; that these matters are purely mangerial and necessary to be confided to such railway company the better to serve the public and its stockholders and investors. The foregoing are among the more important considerations urged by complainant in its bill as justifying the removal desired.

Anticipating this action on the part of complainant the respondents, Lawrence and Taylor, appearing for themselves, the Chamber of Commerce of the City of Sapulpa,

and the citizens of said city, procured from the Corporation Commission of the State of Oklahoma the following order:

"This cause coming on to be heard on this 29th day of December, 1926, upon motion of the complainants, and it appearing that the defendant is taking steps toward the removal of its shops and division point from the City of Sapulpa in violation of the order of this Commission entered on the 5th day of February, 1917, and in violation of the Act of the Legislature passed in 1917, it is ordered by the Commission that said cause be set down for hearing on the 17th day of January, 1927, and that in the meantime, and until the further order of the Commission, the defendant be, and it is hereby prohibited from moving its shops or division point from the City of Sapulpa, from changing the runs of either its passenger or freight trains, or from taking any other steps towards changing its division point for either passenger or freight service from the said City of Sapulpa."

[fol. 133] A hearing on this matter was set before the Corporation Commission for the 17th day of January, 1927. On January 11, 1927, complainant filed its bill against respondents herein charging that the statutes, hereinabove set forth, in so far as they are sought to be made applicable to the conditions hereinabove described are unconstitutional, confiscatory, arbitrary, unnecessary and void, and that as so applied they granted to the Corporation Commission authority to issue orders and decide questions directly regulating, affecting and constituting a burden on interstate commerce; that said orders are, therefore, beyond the authority of the Corporation Commission and, therefore, void, and that respondents be enjoined from compelling complainant to submit to the jurisdiction of the Corporation Commission in the matters aforesaid, in order that complainant may not suffer irreparable injury and damage that it otherwise must suffer if prevented from removing its shops as aforesaid.

A temporary restraining order was issued and a court, composed of the three judges now sitting, was convened for the hearing of the temporary injunction. At that hearing the crucial point submitted was the authority of the Cor-

poration Commission of the State of Oklahoma over the matter in controversy. Conceiving this to be the only substantial contested issue, and that its speedy determination by the court of last resort was desired, and was for the best interest of both parties, the court addressed itself broadly to a decision of that question, and being of opinion that the power of location of shops and divisions points by [fol. 134] an interstate railroad, as affecting its interstate traffic, was essential to the discharge of its obligations as an interstate carrier, and that the subjection of this right to state control would necessarily burden interstate commerce and contervail the spirit of the Act to regulate commerce, as amended, granted the temporary injunction prayed. Unfortunately these reasons, stated orally in announcing our decision, were not preserved in the record presented to the Supreme Court, and thus that court, on appeal, was not made aware of the considerations which governed our action.

The Supreme Court being of opinion that the state law prescribing an important change in local transportation conditions, without application to the State Commission, might be valid, considered it important that the demands of comity and courtesy should have been observed; that application to the Corporation Commission should have been made before resort to the injunction process in the federal court, the presumption being that the Commission would have granted the application for removal if the facts justified it and that irreparable injury to complainant for the short period deemed to be necessary for that hearing had not been made clearly to appear. The case, therefore, was reversed and remanded and the controverted point left undecided.

In their petition for appeal from the order granting the temporary injunction respondents prayed "that the proper order touching security be made without superseding the decree referred to and they tender bond in such amount as [fol. 135] the court may require." Accordingly complainant, as a condition to the granting of the temporary injunction, was required to give bond in the sum of $50,000, to cover such damages that might be sustained if it should

result that that temporary injunction was improvidently granted. In the absence of supersedeas the interlocutory decree set the railway free to remove its shops, subject, of course, to their restoration to the City of Sapulpa if the case should ultimately be decided against it. Pending appeal the removal took place. After the coming down of the mandate from the Supreme Court respondents filed motion for an order requiring complainant to restore the conditions with respect to shops and division point as they existed prior to the hearing on temporary injunction, and that further proceedings in the case should be stayed until that should be done. After full hearing this motion was denied, for reasons stated in the opinion of this court, filed November 28, 1927, to which reference is hereby made. At the hearing it was shown that the cost of such restoration would amount at least to $300,000; that if on final hearing the decree should favor complainant an additional expense of $300,000 would be incurred in removing the shops and division point again to Tulsa. It was the judgment of the court that the expenditure of removal should not be incurred until and unless the decision upon final hearing should make it necessary. Thereupon, the court ordered that "before further steps looking to a final hearing of this cause are taken, that said plaintiff should make applica- [fol. 136] tion the Corporation Commission of the State of Oklahoma, to dissolve its restraining orders heretofore made restraining said plaintiff from removing its shops and division point from the City of Sapulpa to the City of Tulsa, and to ratify the action of said road in removing its said shops and division point during the pendency of this cause," and that "final hearing of this cause be suspended until the result of said application to the Corporation Commission be ascertained, and it is further ordered that this court shall and will retain jurisdiction of this cause so that any action, order or judgment may be taken or made by this court that may be necessary to protect the rights of any parties hereto." Seasonably thereafter complainant made such application to the Corporation Commission and asked a hearing thereunder. Respondents, through their counsel, appeared before the Commission and opposed any hearing upon the

merits of the application until complainant had made the restoration of its shops and division point to Sapulpa, thereby, in effect, renewing before the Commission the motion to that effect which had been denied by this court, as above stated. The Corporation Commission ruled with respondents and declined to hear complainant's application until such restoration was made. The result of these proceedings was reported to this court in a supplemental bill of complaint, in which complainant prayed relief as in its original bill and for such other relief, either general or special, to which, in good conscience and equity, it might be entitled in the premises.

Thereupon, to the original bill, and this supplemental bill, respondents filed their motion to dismiss for the stated reason that the same "do not state facts sufficient to con-[fol. 137] stitute a cause of action against the defendants or to entitle the complainant to equitable relief." At the hearing thereon both parties announced their desire that the case be submitted for final decree upon this motion without further pleading or presentation. Arguments were made, authorities submitted, and a submission was made with that understanding.

At the argument counsel for respondents urged two propositions in support of their motion; first, that the bills show on their face that complainant has not exhausted its remedy before the state tribunal; that until it has done so it has no standing in this court; second, that the Oklahoma Statutes in controversy are constitutional and the authority of the Corporation Commission thereunder is controlling. Reliance is placed upon the decision of the Supreme Court on the former appeal, (Lawrence vs. St. Louis-San Francisco Railway Company, 274, U. S. 588) and upon the following cited cases:

Western & Atlantic R. R. vs. Georgia Public Service Commission, 267 U. S. 493;

Henderson Water Company vs. Corporation Commission, 269 U. S. 278;

International & Great Northern Ry. Co., et al. vs. Anderson County, et al. 246 U. S. 424.)

Other cases are, of course, cited in the original briefs, but the foregoing constitute the main reliance upon the question presented by this motion.

In the opinion of the Supreme Court of Lawrence vs. St. Louis-San Francisco Railway Company, supra, the considerations which governed the Supreme Court were ex- [fol. 138] pressly stated to be of weight on application for a preliminary or temporary injunction. The concern of that court was that conflict and irritation between state and federal authorities should be avoided whenever possible; that the federal power be not exerted unnecessarily, hastily, or harshly; that the demands of comity and courtesy, as well as of the law, be deferred to; and that the necessity of a temporary order to avoid irreparable injury and loss should clearly appear. The court did not undertake to determine whether the Oklahoma Statute, or the action of the Commission thereunder, was obnoxious to the federal constitution. The jurisdiction of this court to proceed to final hearing was recognized. In the opinion it is stated:

"No right or interest of the Railway would have been prejudiced by participating in the hearing before the Commission and awaiting the result thereof. The Railway would not thereby have waived its right to contest in the federal court the validity of the Oklahoma law. * * *

"The Railway asserts that the removal would result in an improved service and in economy in operation. If this appeared to be true, it was the duty of the Commission, under the Oklahoma law, to authorize of the removal, unless thereby the health of the employees of the Railway or of their families was imperiled. It is not to be assumed that the Railway proposed to remove the shops to an unhealthy location. * * *

"The effect of the Commission's restraining order was merely to keep things in statu quo until the final hearing in federal court."

"We have no occasion to determine whether the Oklahoma Act is obnoxious to the Federal Constitution. * * *

"The delimitation of the respective powers of the two governments (state and national) requires often nice ad-

justments. The federal power is paramount. But public interest demands that, whenever possible, conflict between the two authorities and irritation be avoided."

[fol. 139] There is nothing in this opinion which can be construed as a command that the matter must be referred to the Corporation Commission as a condition precedent to final hearing. But in order that the rule announced by the Supreme Court should be observed in spirit, as well as in letter, and that full deference should be accorded to the demands of comity and courtesy, we exacted application to the Commission before we would enter upon a final hearing of the case. The Commission has declined to hear the application until the performance of a condition which it is without power or authority to enforce. The denial by this court of present restoration was not made out of disrespect for the Commission nor in disregard of its legitimate authority in the premises. It was made in the exercise of what we deemed to be a sound discretion, under the circumstances now existing, for the prevention of what might be unnecessary expenditure, and pursuant to a jurisdiction which had attached, which was expressly retained, and of which this court could not be collaterally deprived. By making its application in good faith, and the refusal of the Commission to entertain that application, complainant has exhausted its remedy before that tribunal in a legal sense. Since this result was brought about at the instance and demand of respondents, they can no longer be heard to insist upon a decision which they opposed and prevented. We proceed to a consideration of the merits of the controversy.

Western & Atlantic Railroad vs. Georgia Public Service Commission, et al., 267 U. S. 493, had to do with a bill to enjoin a State Commission from enforcing an order requiring the plaintiff railroad to maintain service on an in- [fol. 140] dustrial switch track. Intrastate switching service was involved. It was held that under section 402 a Railroad Company could not appeal from an order of a State Commission requiring it to continue switching service on the ground of discrimination until it had invoked the investigation and decision of the Interstate Commerce Commission on this point. Also, the power to order its estab-

lishment or abandonment of such side tracks, though employed largely for its interstate commerce, is not with the Interstate Commerce Commission, but with the States. Under the Act the Federal Commission cannot order abandonment of service exclusively intrastate. (State of Texas vs. Eastern Texas Railroad Company, et al., 258 U. S. 204). This case, therefore, has no application to the point now under consideration.

Henderson Water Co. vs. Corporation Commission of North Carolina, et al., 269 U. S. 278, was an appeal under section 266 of the Judicial Code from an order refusing temporarily to enjoin the enforcement, as confiscatory, of rates established by the Commission until the period of test prescribed in the order had expired. The Commission had allowed a partial increase and reserved to the Water Company the right to apply for further relief at the end of a test period. It was held that the company must exhaust its remedy with the Commission before suing in the district court. This case announces a principle frequently laid down in rate cases, and has no bearing upon the issue now before us.

International & Great Northern Railway Company, et al. vs. Anderson County, et al., 246 U. S. 424, was decided [fol. 141] upon the facts peculiar to that case. It was held that foreclosure and sale of a railroad in a federal court will not relieve the purchaser from a contractual or statutory duty, which rested on its predecessors under state law, to maintain offices and shops at a particular place. There the petitioning railroad was organized under the laws of State of Texas, and was, therefore, a Texas corporation. The Office Shops Act of Texas, containing a prohibition against removal of offices and shops located by contract within a county in consideration of county bond aid, was in effect at the time the railway company took out its charter under general laws that expressly subjected it to the limitations imposed by existing law. It was made a condition of incorporation that this restriction should be accepted. The decision was expressly based upon the special facts there appearing. The court said:

"We are not prepared to say that in this instance the State has transcended its powers."

The case of Texas and Pacific Railway Company vs. Marshall, 136 U. S. 393, more nearly applies to the case under consideration. In that case it appears that:

"The City of Marshall agreed to give to the Texas and Pacific Railway $300,000 in County bonds, and 66 acres of land within the city limits for shops and depots; and the company 'in consideration of the donation' agreed 'to permanently establish its eastern terminus and Texas offices at the City of Marshall, 'and to establish and construct at said city the main machine shops and car works of said railway company.' The city performed its agreements, and [fol. 142] the company, on its part, made Marshall its eastern terminus, and built depots and shops, and established its principal offices there. After the expiration of a few years Marshall ceased to be the eastern terminus of the road, and some of the shops were removed. The city filed this bill in equity to enforce the agreement, both as to the terminus and as to the shops; Held,

(1) That the contract on the part of the railway company was satisfied and performed when the company had established and kept a depot and offices at Marshall, and had set in operation car works and machine shops there, and had kept them going for eight years and until the interests of the railway company and of the public demanded the removal of some or all of these subjects of the contract to some other place;

(2) That the word "permanent" in the contract was to be construed with reference to the subject matter of the contract, and that, under the circumstances of this case it was complied with by the establishment of the terminus and the offices and shops contracted for, with no intention at the time of removing or abandoning them;

(3) That if the contract were to be interpreted as one to forever maintain the eastern terminus, and the shops and Texas offices at Marshall, without regard to the convenience of the public, it would become a contract that could not be enforced in equity;

(4) That the remedy of the city for the breach, if there was a breach, was at law."

The rule announced in this case has never been modified nor impaired. It is cited with approval in Armour & Company, et al. vs. City of Dallas et al., 255 U. S. 280. To us it seems inconceivable that the managerial control of an interstate railway over the location of its shops and division points, for the purpose of coordinating its facilities in the discharge of its interstate commerce business, should be made subject to the control of the individual states acting [fol. 143] in the interest of local communities and to the disadvantage of public convenience generally. It has been consistently held that interstate rates cannot be made the subject of private contract.

> New York, New Haven & Hartford R. R. Co. vs. Interstate Commerce Commission, 200 U. S. 361; Armour Packing Co. vs. United States, 209 U. S. 56.)

The same principle, in our judgment, applies generally to all essential instrumentalities of interstate commerce.

As said by the Supreme Court, in the instant case, the federal power is paramount. Upon the undisputed allegations of the bills, with the attending presumptions, the removal of these shops and this division point is demanded in the interest of economy in operation and improved service to the shipping and traveling public. The policy of the railway in this regard accords with the spirit of latest progressive legislation for maintaining the efficiency and economical operation of an interstate commerce railway system which serves both the states and the nation. (Dayton-Goose Creek Ry. vs. United States, 263 U. S. 456-485.) It follows that the motion to dismiss will be overruled and that in conformity with the terms of this submission a decree will be entered in favor of complainant. All concur.

[fol. 144] In United States District Court

[Title omitted]

Service of Appeal. Filed March 17, 1928

To St. Louis San Francisco Railway Company and Stuart, Cruce and Franklin, its attorneys of record:

This is to notify you that the defendants, J. F. Lawrence, C. C. Taylor, Edwin Blakney, Attorney General of the State

of Oklahoma, Frank C. Carter, Fred Capshaw and C. C. Childers, individually and as members of the Corporation Commission of the State of Oklahoma, appeal to the Supreme Court of the United States from the judgment and decree of this court, made and entered herein on the 22nd day of October, 1927, overruling defendants's motion for restitution, and the order and judgment of this court made and entered herein on the 12th day of March, 1928, overruling defendant's motion to dismiss complaint and supplemental complaint of plaintiff herein, and entering judgment in favor of complainant, and that said appeal will be perfected by filing with the clerk of said court this notice of appeal.

P. K. Morrid, Assistant Attorney General, C. B. Ames, Attorneys for Defendants and Appellants.

Due and timely service of the foregoing notice of appeal is hereby acknowledged to have been made is accepted on this 15 day of March, 1928.

St. Louis San Francisco Railway Co., by C. B. Stuart, Ben Franklin, Its Attorneys.

[File endorsement omitted.]

[fol. 145] In United States District Court

[Title omitted]

Petition for Appeal and Order Allowing Same—Filed March 17, 1928

To the Honorable Franklin E. Kennemar, Judge of the District Court of the United States for the Northern District of Oklahoma:

The above named defendants, J. F. Lawrence, C. C. Taylor, Edwin Dabney, attorney general of the State of Oklahoma, Frank C. Carter, Fred Capshaw and C. C. Childers, individually, and as members of the Corporation Commission of the State of Oklahoma feeling themselves aggrieved by the order and judgment made and entered in this cause on the 12th day of March, 1928, overruling motion of the defendants to dismiss the complaint and supplemental complaint of the plaintiff herein, and rendering judgment

against the defendants herein, and the order and judgment of the court made and entered herein on the 22nd day of October, 1927, overruling the motion of the defendants for restitution, do hereby appeal from said decree, judgments and orders to the Supreme Court of the United States, for the reason specified in the assignment of error, which is filed herewith, and they pray that this appeal be allowed, that citation issued as provided by law, and that a tran-
[fol. 146] script of the record, proceedings and papers from which said judgments and orders were granted duly authenticated may be sent to the Supreme Court of the United States sitting at Washington, under the law in such cases made and provided:

Your petitioners further pray that the proper order touching security without superseding the decree referred to and they tender bond in such amount as the court may require.

C. B. Ames, T. L. Blakemore, Attorneys for the Defendants J. F. Lawrence and C. C. Taylor. P. K. Morril, Attorneys for Defendants Edwin Dabney, Frank C. Carter, Fred Capshaw, and C. C. Childers.

Order Allowing Appeal

Now, on this 17th day of March, 1928, come the above fendants presented this petition for appeal, and upon consideration, it is ordered that the appeal be and the same is hereby allowed upon the giving of bond for cost, as required by law, in the sum of Five Hundred ($500.00) Dollars.

F. E. Kennamer, Judge of the United States District Court for the Northern District of Oklahoma.

[File endorsement omitted.]

[fol. 147] In United States District Court

[Title omitted]

Assignments of Error—Filed March 17, 1928

Now, on this 17th day of March, 1928, come the above named defendants by their solicitors, and say, that the order

of the Court entered in the above cause on the 22nd day of October, 1927, and the order and judgment of the court entered on the 12th day of March, 1928, are erroneous and unjust to the defendants for the following reasons:

1. That the court erred in overruling the motion of the defendants for restitution.

2. That the court erred in overruling the motion of the defendants to dismiss the complaint and the amended complaint of the plaintiff.

3. The court erred in rendering judgment in favor of the plaintiff and against the defendants.

4. The court erred in holding that the Act of the Legislature of 1917, pleaded in the Bill of Complaint in said cause, is in violation of the Constitution of the United States and void.

Wherefore the defendants pray that said orders, decrees [fol. 148] and judgments be reversed.

C. B. Ames, T. L. Blakemore, Attorneys for Defendants J. F. Lawrence and C. C. Taylor. P. K. Morril, Attorneys for Defendants Edwin Dabney, Frank C. Carter, Fred Capshaw, and C. C. Childers.

[File endorsement omitted.]

[fols. 149-151] Bond on appeal for $500.00 approved and filed March 17, 1928, omitted in printing.

[fol. 152] In United States District Court

[Title omitted]

Notice of Perfection—Filed March 17, 1928

To the St. Louis-San Francisco Railway Company, complainants:

You will please take notice that the above named defendants and appellants, will, on the 17th day of March, 1928,

file with the Clerk of the above named Court, together with proof, acknowledgment of service of the same, a præcipe for the portions of the record to be incorporated in the transcript of appeal, a copy of which præcipe is hereto attached and made a part of this notice.

Dated this 15th day of March, 1928.

J. F. Lawrence, C. C. Taylor, Edwin Dabney, Attorney General of the State of Oklahoma; Frank C. Carter, Fred Capshaw, and C. C. Childers, Individually and as Members of the Corporation Commission of the State of Oklahoma, Defendants and Appellants, by P. K. Morril, C. B. Ames, T. L. Blakemore, Their Counsel.

[fol. 153] Due and timely service of the foregoing notice, together with copy of præcipe attached thereto is acknowledged to have been made, and is accepted this 15 day of March, 1928.

St. Louis-San Francisco Railway Co., by Stuart & Franklin, Its Attorneys.

[File endorsement omitted.]

[fol. 154] In United States District Court

[Title omitted]

Præcipe for Transcript of Record—Filed March 17, 1928

To the Clerk of the District Court of the United States for the Northern District of Oklahoma:

In making up the record and transcript for the Supreme Court of the United States in the above entitled cause, you are hereby notified as follows:

First. That the appellants elect to have the record herein printed under the supervision of the Clerk of the Supreme Court of the United States and under the rules of that court.

Second. That you will include in the record and transcript only such parts as are herein mentioned, omitting all other parts of the record, that is to say:

1. The original Bill of Complaint filed in said [fol. 155] cause.

2. Motion of defendants for restitution filed on the 25th day of June, 1927.

3. Plaintiff's amendment to complaint.

4. Transcript of the proceedings on October 22nd, 1927, on hearing of defendants' motion for restitution.

5. Order directing plaintiff to make certain application with the Corporation Commission of the State of Oklahoma, made on the 22nd day of October, 1927.

6. Opinion and order of the court overruling defendants' motion for restitution filed 22 day of Oct. 1927.

7. Supplemental Complaint.

8. Defendants' motion to dismiss plaintiff's Complaint and Supplemental Complaint.

9. Order and judgment of the court made and entered on the 19th day of March, 1928, overruling defendants' motion to dismiss complaint and supplemental complaint of plaintiff's, and rendering judgment against defendants.

10. Opinion on final hearing.

11. Petition for allowance of appeal.

12. Assignments of error.

13. Bond on appeal.

14. Citation of appeal.

15. Notice of Præcipe and this Præcipe.

16. Notice of Appeal.

P. K. Morrd, Assistant Attorney General, C. B. Ames, T. L. Blakemore, Attorneys for Defendants and Appellants.

[fol. 156] All formal ties of the time and manner of serving the aforesaid præcipe are waived, and the appellee agrees that the præcipe may be filed; that it calls for all papers which should become a part of the record and that the same may be incorporated in the transcript on appeal without further notice to us.

Dated this 15th day of March, 1928.

St Louis San Francisco Railway Co., by C. B. Stuart, Its Attorneys.

[File endorsement omitted.]

[fol. 157] Certificate of H. P. Warfield, Clerk of D. C. U. S., Northern Oklahoma, to foregoing transcript omitted in printing.

[fol. 158] In Supreme Court of the United States

Statement of Points to be Relied Upon and Designation by Appellants of the Parts of the Record to be Printed —Filed March 30, 1928

In compliance with the rule, the Appellants respectfully state the following points on which they intend to rely:

The errors assigned in this case are that the Court erred in overruling the motion of the Appellants to dismiss the bill of the Appellee; that the Court erred in overruling the motion of the Appellants to require the Railway Company to make restitution by returning its shops and division point to the City of Sapulpa; that the Court erred in rendering judgment in favor of the Appellee against the Appellants and that the Court erred in holding that the Act of the Legislature of Oklahoma in 1917, pleaded in the Bill of Complaint in said case violates the Constitution of the United States.

In presenting these assignments of error, the Appellants will rely upon the following propositions:

1. This action was prematurely brought.

The Act of the Legislature in question provides that, after a railroad company has maintained its shops and [fol. 159] terminals at any given point in the state for a period of five years, that it cannot remove them until after presenting an application to the Corporation Commission, and securing an order permitting it to do so. The Appellee in this case filed a bill without presenting such an application. While this case was pending on appeal in this court, the Appellee moved its shops and division point from Sapulpa to West Tulsa in violation of the statute and of the two previous orders of the Corporation Commission. Thereafter, the Appellants, or some of them, filed a motion in the District Court to require Appellee to return its shops and division point. The District Court denied the motion, but directed Appellee to make application to the Corpora-

tion Commission for an order ratifying its action in removing its shops and division point in violation of the statute, and of the previous orders of the Commission. The Commission declined to entertain this application because the Appellee was in contempt of its previous order. The Commission, therefore, has never passed on the right of the Appellee to move from Sapulpa, and Appellants contend that, therefore, this action is prematurely brought.

2. The statute involved is a valid exercise of the police power of the state, being enacted for the preservation of the health, safety, and convenience of the railroad employees, of the communities in which shops and terminals are located, and of the general public's welfare.

3. The statute involved is a valid exercise of the power of the state to regulate railroads, there having been no assertion of national power over the subject.

4. The statute involved is not a regulation of interstate commerce, and if it affects interstate commerce at all, does [fol. 160] so remotely and indirectly.

5. It was the duty of the District Court, after this Court had revised its previous order granting a temporary injunction, to require the railroad company to restore the status quo existing at the time when temporary injunction was issued.

6. Upon the application in the District Court for an order of restitution, the matter should have been heard by the District Judge and not by a three judge court.

In view of the fact that the record consists almost entirely of the pleadings, the Appellants request that the entire record be printed, as they believe this course is necessary for the proper presentation of the points on which the Appellants rely.

Edwin Dabney, Atty. Gen., T. L. Blakemore, C. B. Ames, Attorneys for Appellants. Ames, Cochran & Ames, of Counsel.

The undersigned, Attorneys for Appellee, hereby accept service of a copy of the above entitled paper, and concur in the request to have the entire transcript printed, waiv-

ing the time allowed by the rules for designating additional parts of the record.

C. B. Stuart, Cruce & Franklin, Attorneys for Appellee.

[fol. 161] [File endorsement omitted.]

Endorsed on cover: File No. 31,313. N. Oklahoma D. C. U. S. Term No. 861. J. F. Lawrence, C. C. Taylor, Edwin Dabney, etc., et al., appellants, v. St. Louis-San Francisco Railway Company. Filed March 24th, 1928. (31,313.)

NOV 6 1928
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928

NUMBER 99

J. F. LAWRENCE ET AL., APPELLANTS,

vs.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, APPELLEE.

BRIEF OF THE APPELLANTS.

EDWIN DABNEY,
Attorney General of Oklahoma,

T. L. BLAKEMORE,
C. B. AMES,
Attorneys for Appellants.

AMES, COCHRAN & AMES,
of Counsel.

INDEX.

Page

Preliminary Statement 1

Statement of the Facts 3

The Statute Involved 5

Assignment of Errors 7

Statement of Points Relied Upon 8

Argument—

First. It was the duty of the Railway Company, before seeking relief in the Federal Courts, to comply with the Oklahoma Statute and the orders of the Corporation Commission 10

Second. The application made by the Railway Company to the Corporation Commission did not comply with its duty or with the requirements of the statute 13

Third. The Act of the Legislature is primarily designed to protect the health of railroad employees and their families 24

Fourth. A state may legislate to protect the health of railroad employees 26

Fifth. There is no Act of Congress relating to the subject covered by this Act 27

Sixth. The Act here involved does not conflict with the Commerce Clause of the Constitution 29

International & Great Northern Railway Company vs. Anderson County, 246 U. S. 424 29

Seventh. Laws passed by a state in the exercise of its police powers are valid, even though they indirectly affect interstate commerce 34

Eighth. Imposing the burden of proof on the Railway Company is a valid provision 43

Page

Ninth. It was the duty of the District Court to require the Railway Company to return its shops and division point to Sapulpa 43

Tenth. It is well settled that on reversal of a judgment restitution will be ordered 46

Eleventh. Our motion to require the Railway Company to restore the status quo should have been heard by the District Judge, and it was error for the three judges to sit 51

Table of Cases

Arkadelphia Milling Co. vs. St. L. West. Ry. Co. 40
Armour & Co. vs. North Dakota 42
Ashwell vs. Kansas 40
Atlantic Coast Line Co. vs. Georgia 42
Atlantic Coast Line Co. vs. Maxwell 40
Atlantic Coast Line Co. vs. Seaboard Air Line Co. 52
Beaufort County Lbr. Co. vs. Gillingham 10
Burns vs. Shipley 18
Campbell vs. Justices Superior Court 16, 20
Crooker vs. Butler 18
Chi., Milwaukee & St. Paul Ry. Co. vs. Solan 39
Chi., Milwaukee & St. Paul Ry. Co. vs. Arkansas 41
Coker vs. Richey 50
Corn Products Ref. Co. vs. Eddy 41
Crabtree vs. Baier 18
Crossman vs. Larman 40
Earle vs. Earle 17
Erb vs. Morasch 40
Grand Trunk Ry. Co. vs. Michigan Railroad Comm. 41
Graves vs. Minnesota 37
Haight vs. State 20
Hammond Pack. Co. vs. Arkansas 42
Hennington vs. Georgia 34, 39
Herrington vs. Herrington 37
Hull on Injunctions, 4th ed., par. 58 32

Page

Hovey vs. Elliott 21
Inter. & Grt. North. Ry. Co. vs. Anderson Co. 29
James Dickerson Farm Mtg. Co. vs. Harry 43
Kansas City So. Ry. Co. vs. So. Trust Co. 52
Knoop vs. Knoop 17
Lake Shore & Mich. So. Ry. Co. vs. Ohio 40
Lake Shore & Mich. So. Ry. Co. vs. Taylor 52
Lawrence vs. St. L. & S. F. R. R. Co. 10, 44
Leisy vs. Hardin 34
Mayor of New York vs. Miln 36
Mass. State Grange vs. Benton 35
Merchants Exchange vs. Missouri 42
Missouri, K. & T. Ry. Co. vs. Haber 34, 39
Moore, Ins. Commr., vs. Fidelity & Deposit Co. 56
Morris vs. Gray 52
Mowrer vs. State 53
Muesca vs. Bartlett 18
Napier vs. Atlantic Coast Line Ry. Co. 26
Nashville, Chat. & St. L. Ry. Co. vs. Alabama 38
New Mexico, etc., Ry. Co. vs. Denver 40
New York, New Haven & Hart. Ry. Co. vs. New York 39
Northwestern Fuel Co. vs. Brock 46, 50
Norton vs. Commission 19
Oklahoma Comp. Stat. 1921, Sec. 3482 6
Oklahoma Comp. Stat. 1921, Secs. 3483, 3484 and 3485 6
Pantapeco Guano Co. vs. N. C. Bd. of Agr. 39
People ex rel. Alexander vs. District Court 53
Plumley vs. Mass. 38
Pure Oil Co. vs. Minnesota 42
Railroad Commission vs. So. Pac. Ry. Co. 28
Red "C" Oil Co. vs. North Carolina 41
Reid vs. Colorado 40
St. L. S. W. Ry. Co. vs. Consolidated Fuel Co. 52
Savage vs. Jones 41
Silver Peak Mines vs. Hamblett 53
Sligh vs. Kirkwood 42
Smith vs. Alabama 38

Page

Smith vs. Wilson 58, 62
Soderberg vs. Soderberg 17
So. Covington & Cinn. St. Ry. Co. vs. Kentucky 43
Twenty-one Mining Co. vs. Original Sixteen, etc. 53
U. S. Code, Sec. 380, and Amend. thereto 54
U. S. Code, Sec. 17, and Amend. thereto 61
U. S. Rev. St., Sec. 724 23
Vanzandt vs. Argentine Min. Co. 53
Village of Euclid vs. Ambler Realty Co. 35
Wagnelin vs. Goe 52
Western & Atl. R. R. Co. vs. Ga. Public Ser. Comm. 11, 43
Western Union Tel. Co. vs. Comm'l. Milling Co. 41
Western Union Tel. Co. vs. Crovo 41
Western Union Tel. Co. vs. James 38

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928

NUMBER 99

J. F. LAWRENCE ET AL., APPELLANTS,

vs.

ST. LOUIS SAN FRANCISCO RAILWAY COMPANY, APPELLEE.

BRIEF OF THE APPELLANTS.

PRELIMINARY STATEMENT.

This is an appeal from the final decree of the District Court for the Northern District of Oklahoma (three judges sitting), holding that the Shops and Division Point Act of the Oklahoma Legislature is unconstitutional, and enjoining the Corporation Commission of the State, the Attorney General, and the citizens of Sapulpa from undertaking to enforce it.

It is the second time that the case has been before this Court. The first appeal was from an order by the same three district judges granting a temporary injunction, and this Court reversed the trial court (*Lawrence v. St. Louis-San Francisco Railway Co.*, 274 U. S. 588) because the

railway company had not applied to the Corporation Commission for permission to move, as required by the statute. While that appeal was pending in this Court, and before the decision, the Railway Company hurriedly moved its shops and division point from Sapulpa.

On May 31, 1927, this Court reversed the action of the three-judge court, and, upon the mandate being filed in the District Court, the Attorney General and the citizens of Sapulpa who were defendants in that action filed a motion in the District Court to require the railway company to restore the status existing at the commencement of the case by returning its shops and division point to Sapulpa (R. 17). This motion was filed on June 25, 1927, but was not heard by the court until October 22, 1927. At that time it was heard by the same three judges who granted the preliminary injunction, the defendants objecting, however, to three judges sitting and insisting that the motion was one which should be heard by the District Judge sitting alone (R. 24). The judges took the motion under advisement, but ordered the railway company to make application to the Corporation Commission to ratify its action in moving its shops and division point (R. 43).

On November 5, 1927, the railway company filed such an application before the Corporation Commission, but did not offer to restore its shops and division point in the event the Commission ruled against it (R. 63).

On November 28, 1927, the three-judge court filed an opinion denying the motion to require the railway company to make restitution (R. 44).

On December 5, 1927, the Corporation Commission declined to consider the application of the railway company on the ground that the railway company was in contempt and had not offered to purge itself of contempt (R. 86).

On January 12, 1928, the railway company filed a supplemental bill in this cause in which the proceedings before the Corporation Commission were set out in full (R. 54).

On January 17, 1928, the defendants in the District Court filed a motion to dismiss the bill and supplemental bill for want of equity (R. 88).

On March 12, 1928, the three-judge court, consisting of the same three judges, overruled the motion to dismiss and entered judgment for the railway company granting it a permanent injunction (R. 88).

This appeal brings to this Court for review the final decree of the District Court.

STATEMENT OF THE FACTS.

The material facts are stated in the previous opinion of this Court. They now all appear in the original bill commencing at page 1 of the record, and the supplemental bill commencing at page 54, and the exhibits attached to

these pleadings. The line of the Railway Company was originally built into Sapulpa, Oklahoma, in 1898, and shops and division point were then located at Sapulpa, and were continuously maintained there until the commencement of this action.

In 1917, the Railway Company indicated its intention of moving the shops and division point, and in February of that year Messrs. Lawrence and Taylor, as citizens of Sapulpa, filed an application before the Corporation Commission for an order preventing the Railway Company from making this move.

At the time this application was filed, the Commission entered a temporary order prohibiting the Railway Company from moving the shops and division point until after a hearing and the further order of the Commission (R. 751).

While this case was pending, and this temporary order in effect, the legislature of the State passed the Act of 1917, the constitutionality of which is now involved in this case.

For ten years nothing further happened. The railway company made no effort to move its shops and division point, and no further proceedings were taken in the case before the Corporation Commission.

In December, 1926, the railway company again indicated its intention of moving the shops and division point,

and the citizens of Sapulpa filed a motion in the case then pending before the Corporation Commission setting out that, notwithstanding the previous temporary order, and notwithstanding the Act of the legislature, the railway company was about to make the move.

The Corporation Commission thereupon issued a second temporary order prohibiting the removal until the further order of the Commission, and setting the cause for hearing in January of 1927 (R. 76).

The railway company thereupon, without appearing before the Commission, or in any wise seeking to set aside its two orders, and without seeking its permission in any other way, filed its bill in this cause and secured a temporary injunction enjoining the Corporation Commission, the Attorney General of Oklahoma, and the citizens of Sapulpa from proceeding further in the cause then pending before the Corporation Commission, from undertaking to enforce the orders which had been made by the Commission, and from taking any action under the statute on the ground that the statute was unconstitutional.

An appeal was immediately taken to this Court, and, while this appeal was pending, the railway company hurriedly moved its shops and division point under the protection of the temporary injunction.

THE STATUTE INVOLVED.

The Act of the Legislature of 1917, the validity of

which is involved in this case, is contained in Sections 3482 to 3485, inclusive, of the Compiled Oklahoma Statutes 1921, and reads as follows:

"3482. REMOVAL—PERMIT. That no person, receiver, firm, company or corporation owning, operating or managing any line of steam railroad in this State shall be allowed to remove railroad shops or division points which have been located at any place in this State for a period of not less than five years without previously securing the permission of the Corporation Commission to make such removal.

"3483. CORPORATION COMMISSION—JURISDICTION. If, and when any such person, receiver, firm, company or corporation desires to remove any such railroad shops or division point described in Section One of this act, it shall be his duty to file an application with the Corporation Commission setting forth the present location of such shops or division point and the reasons for such removal, and thereupon the Corporation Commission shall have full power and jurisdiction to entertain such complaint, but before hearing the same or making any order permitting such removal to be made, said cause shall be set down for hearing, not less than ten days' notice shall be given the city, town or village in which or at which such shops or division point have been maintained, and after giving all parties interested a full and complete hearing in the premises the Commission may, in its discretion, permit or refuse such request for a removal.

"3484. HEARING—BEFORE CORPORATION COMMISSION. When an application is filed before the Commission for the removal of terminals or car shops, as provided in Section Two, the Commission shall hear evidence on the relative efficiency and expense of handling traffic through the proposed terminal as compared with the present facilities, and shall consider all other facts and circumstances affecting the various inter-

costs involved. In determining the adequacy of the present facilities the Commission shall consider the same increased by an expenditure equal to the amount necessary to remove the same to the proposed location or an amount equal to the necessary expenditure to establish such facilities at the new location. It is hereby further provided that the Commission shall hear evidence and shall make a finding of fact as to the sanitary and habitable conditions of the proposed location with reference to whether the same would endanger the health of the employees of the applicant or the health of their families. If the Commission should find that the sanitary or habitable conditions at the proposed location of said terminal facilities would endanger or injuriously affect the health of the employees of said applicant or their families, the Commission shall deny said application and order the said terminal facilities and car shops to remain at the present location.

"3485. PROOF—BURDEN UPON APPLICANT. On any such hearing, as provided in this Act, the presumption shall be against the removal, and the burden of proof rest upon the applicant to show that such removal ought to be made."

In the bill of complaint the railway company also quotes Section 5548 of the Compiled Statutes 1921, but this section is not a part of the 1917 Act, was passed ten years earlier, and is not involved in this cause.

ASSIGNMENT OF ERRORS.

The errors assigned are as follows:

1. That the court erred in overruling the motion of the defendants for restitution.

2. That the court erred in overruling the motion of

the defendants to dismiss the bill of complaint and the amended bill of complaint of the plaintiff.

3. The court erred in rendering judgment in favor of the plaintiff and against the defendants.

4. The court erred in holding that the Acts of the Legislature of 1917, pleaded in the bill of complaint in said cause, is in violation of the Constitution of the United States and void.

STATEMENT OF POINTS RELIED UPON.

1. That the action was prematurely brought.

The Act of the legislature in question provides that, after a railroad company has maintained its shops and terminals at any given point in the state for a period of five years, that it cannot remove them until after presenting an application to the Corporation Commission, and securing an order permitting it to do so. The appellee filed the bill in this case without presenting such an application and secured a temporary injunction. While this case was pending in this Court, on appeal from that order, the appellee moved its shops and division point from Sapulpa to West Tulsa in violation of the statute and of the two previous orders of the Corporation Commission. After the reversal by this Court, the appellants, or some of them, filed a motion in the District Court to require appellee to return its shops and division point. The District Court denied the motion, but directed appellee to make application to the Corporation Commission for an order ratifying its action in removing its shops and divi-

sion point in violation of the statute, and of the previous orders of the Commission. The Commission declined to entertain this application because the appellee was in contempt of its previous order. The Commission, therefore, has never passed on the right of the appellee to move from Sapulpa, and appellants contend that, therefore, this action is prematurely brought.

2. The statute involved is a valid exercise of the police power of the state, being enacted for the preservation of the health, safety, and convenience of the railroad employees, of the communities in which shops and terminals are located, and of the general public welfare.

3. The statute involved is a valid exercise of the power of the state to regulate railroads, there having been no assertion of national power over the subject.

4. The statute involved is not a regulation of interstate commerce, and if it affects interstate commerce at all, does so remotely and indirectly.

5. It is the duty of the district court, after this Court had reversed its previous order granting a temporary injunction to require the railroad company to restore the *status quo* existing at the time when the temporary injunction was issued.

6. Upon the application in the district court for an order of restitution, the matter should have been heard by the district judge and not by a three-judge court.

ARGUMENT.

First.

It was the duty of the Railway Company, before seeking relief in the Federal court, to comply with the Oklahoma Statute and the orders of the Corporation Commission.

We think this point has been decided by this Court on the first appeal.

It is true that this Court held that it was unnecessary to determine whether the Oklahoma Act is obnoxious to the Federal Constitution, but we submit that the decision plainly intimates that it was the duty of the railway company to follow the procedure outlined by the statute because this Court says, commencing at page 594 of 274 U. S.:

> "We have no occasion to determine whether the Oklahoma Act is obnoxious to the Federal Constitution. But as bearing upon the propriety of issuing the temporary injunction, the fact is important that the controversy concerns the respective powers of the Nation and of the States over railroads engaged in interstate commerce. Such railroads are subject to regulation by both the State and the United States. The delimitation of the respective powers of the two governments requires often nice adjustments. The federal power is paramount. But public interest demands that, whenever possible, conflict between the two authorities and irritation be avoided. To this end it is important that the federal power be not exerted unnecessarily, hastily, or harshly. It is important also that the demands of comity and courtesy, as well as of the law, be deferred to. It was said in *Western & Atlantic R. R. v. Georgia Public Service Commis-*

sion, 267 U. S. 493, 496, that a law of a State may be valid which prohibits an important change in the local transportation conditions without application to the state commission, although the ultimate authority to determine whether the change could or should be made may rest with the federal commission. And it was there said that the 'action of the company in discontinuing the service without a petition' to the state body 'was arbitrary and defiant.' Compare *Henderson Water Co.* v. *Corporation Commission*, 269 U. S. 278. To require that the regulating body of the State be advised of a proposed change seriously affecting transportation conditions is not such an obvious interference with interstate commerce that on application for a preliminary injunction the Act should lightly be assumed to be beyond the power of the State."

In *Western & Atlantic Railroad* v. *Georgia Public Service Commission*, 267 U. S. 493, a question was involved which is almost identical with the one now under consideration. In that case the court was considering a rule promulgated by the Public Service Commission, General Order 14, which provided that any and all facilities and privileges enjoyed by shippers to which they were entitled by law or any rule of the Commission, whether granted by voluntary action on behalf of the railroad companies or otherwise, should not be discontinued without the consent of the railroad commission.

That order was the same in substance as the Oklahoma statute, except that it applied to all facilities and privileges while the Oklahoma statute only applies to railroads' shops and division points. The Court, in delivering the opinion in that case, at page 499 says:

"The three-judge court refused the application, on the ground that Rule 14 had not been complied with. Rule 14 is a reasonable rule and the Commission was fully justified in refusing to sanction a discontinuance of service until a petition had been filed with the Commission and a showing made. The doubt which arises in our minds is whether the Public Service Commission, by its consent to a full hearing of the issue without a formal petition and an order issued on the merits, did not waive the defect of a petition. The action of the company in discontinuing the service without a petition was arbitrary and defiant, but the subsequent action of the Commission seems to have condoned the fault in such a way as to prevent our making it a reason for not looking farther into the issues now raised by the company in its bill.

"It is said that the requirement of the continuance of the service deprived the company of its property without due process of law, in violation of the Fourteenth Amendment, because the service rendered by the side track was much greater in out of pocket cost than the compensation. This can not be sustained. The service has been rendered for years. It was a voluntary arrangement, and under its statutory powers (Sec. 2664, Georgia Code, 1910) was made irrevocable by the Public Service Commission under Rule 14, except by consent of the Commission. The spur track was for a public purpose. *Union Pac. R. Co. v. C. & N. W. Ry. Co.*, 233 U. S. 211. The requirement that such a service should not be discontinued without notice and hearing was clearly within the police power of the State. *Chicago & Northwestern R. R. Co. v. Dey*, 35 Fed. 866, 869; 1 U. S. 315; *Pub. Util. Com. of Western R. R. Co. v. Simmons*, 249 U. S. 422; *Railroad Commission v. L. & N. R. R. Co.*, 148 Ga. 442. Even if the cost of the switching is more than what is received for it, we can not determine on any showing made by the company that the switching does not work a benefit to the

increased business that the company gets, or may get, by reason of the added facilities furnished by the switching. The switch is a small part of the whole railway, and the mere fact that the switching may not be profitable by itself can not be a loss. See *Fort Smith Light & Traction Company* v. *Bourland*, 267 U. S. 330."

Here the action of the railroad company in taking advantage of the temporary injunction to remove its shops and division point was not only "arbitrary and defiant" but was also a gross abuse of the process of the court, and so completely changed the *status quo* as to annul the statute and destroy the power of the Corporation Commission; nor has the Commission here "condoned the fault", as was true in the Georgia case just quoted.

Second.

The application made by the Railway Company to the Corporation Commission did not comply with its duty or with the requirements of the Statute.

The application of the railway company to the Corporation Commission is Exhibit "A" to the supplemental complaint found at page 63 of the record. It appears on the face of this application (p. 70) that the railway company had moved its shops and division point in violation of two orders of the Corporation Commission (pp. 70-71) and of the statute of the State. The application then sets up the temporary injunction, that while the temporary injunction was in effect the railway company had moved its

shops and division point; that this Court had reversed the judgment of the district court granting the temporary injunction, and that the three-judge court had then ordered the applicant to petition the Corporation Commission to ratify its acts in violating the orders of the Commission and disobeying the laws of the State. The application prays that the Commission set aside its orders theretofore made, that the removal be approved, and that the Commission "ratify the action of applicant in removing its said shops and division point from the City of Sapulpa to the City of Tulsa" (p. 75).

The railway company in this application does not offer to return its shops and division point in the event the Commission denies its application.

Messrs. Lawrence and Taylor, the City of Sapulpa in its corporate capacity, and the Chamber of Commerce of the City of Sapulpa filed objections before the Commission to hearing this application "unless the St. Louis-San Francisco Railway Company purges itself of contempt by returning its shops and division point to the City of Sapulpa (p. 83), and in their objections state (p. 85):

"These objectors, therefore, respectfully show to the Commission that the railway company has flagrantly and defiantly violated both orders heretofore rendered by this Commission, and the statute of the State of Oklahoma applicable to such cases, and that said railway company in the present application does not offer to restore its shops

and division point to Sapulpa under any contingencies, even though the present application should be denied.

"Because said railway company is in contempt of this Commission, and does not in any way offer to purge itself of contempt, these objectors respectfully object to its application being heard by this Commission unless it restores its shops and division point to the City of Sapulpa, or in good faith offers to do so in the event this Commission denies its application and orders the railway company to return its shops and division point to the City of Sapulpa."

These objections were sustained (p. 87) and the Commission declined to hear the application of the railway company.

We respectfully submit that the Commission as a self-respecting body could not have done otherwise. The railway company came before the Commission proclaiming its disobedience to the previous orders, prayed that this disobedience be ratified, and made no offer whatever to comply with any order the Commission might make, and this, notwithstanding the fact that objections were filed and urged on the ground, not only that the railway company was in contempt but that it did not offer to purge itself of contempt in the event of an adverse decision by the Commission. This was a plain effort on the part of the railway company to play fast and loose with the Commission. If the Commission held with it, well and good; but, if the Commission held against it, it was refusing to return the shops and division point to Sapulpa.

The authorities are uniformly to the effect that a party in contempt cannot be heard to apply for affirmative relief which, in any way, recognizes and ratifies its contempt.

Campbell v. *Justices of Superior Court*, 187 Mass. 509, 69 L. R. A. 311, 73 N. E. 659, is one of the leading cases.

In that case the Justices of the Superior Court refused to proceed with the hearing of a suit because the moving party was in contempt. Whereupon he filed this action in the Supreme Judicial Court of Massachusetts seeking a writ of mandamus to require the Superior Court to proceed with the trial. In denying the application the court says (p. 313 of 69 L. R. A.):

> "The petitioner, who is the plaintiff in that suit, is in contempt of the court for a violation of an injunction. The principal question is whether a plaintiff who is in contempt has an absolute right to proceed in the trial, * * * such that it is the legal duty of the court, upon his request, to permit him to go on. The authorities agree upon the familiar doctrine that a party in contempt is not in a position to ask the court for any favor or indulgence."

In *Beaufort County Lumber Co.* v. *Cottingham* (N. C.), 84 S. E. 864, the third paragraph of the syllabus is as follows:

> "In an action for specific performance of a contract, where defendants accepted a conditional order for a continuance without complying with the condi-

tions, they were punishable by having their answer stricken out and judgment entered against them *pro confesso* on the complaint, under the general rule that a party in contempt in equity will not be allowed to oppose the relief sought by denial of the bill or by alleging any defense."

In *Knoob* v. *Knoob* (Cal.), 218 Pac. 568, the syllabus is as follows:

"A wife who has taken and keeps a child out of the state without the permission of the husband or of the court, in violation of a modified interlocutory divorce decree, will not be allowed to appeal from the order modifying the decree."

In *Soderberg* v. *Soderberg* (Cal.), 219 Pac. 82, it is said at page 85:

"No party to an action can with right or reason ask the aid or assistance of a court by modifying in his favor its legal orders while he stands in an attitude of contempt with regard thereto (*Weeks* v. *Superior Court*, 187 Cal. 620, 203 Pac. 93), and it matters not that no objection is made by either party. The court of its own motion may refuse aid under such circumstances. *Domenigoni* v. *Imperial Livestock, etc.* (Cal.), 209 Pac. 36."

In *Early* v. *Early*, 261 Fed. 1003, decided by the Court of Appeals of the District of Columbia, the fourth paragraph of the syllabus is as follows:

"Where the record shows that applicant is apparently in contempt of the Court of Appeals, the court may decline to hear oral argument from his counsel."

In *Burns* v. *Shapley* (Ala.), 77 So. 447, it is said at page 451:

"It is made to appear to the satisfaction of the court, by the return of the sheriff on the writ heretofore issued, and by other satisfactory evidence, that the appellee, Walter Shapley, has violated the order of this court by removing the children out of Baldwin County since the rendition of the judgment on the 18th day of December, 1917, and that he is secreting said children from the process of this court, and is therefore in contempt of the orders and authority of the court to enforce its judgment. It is well settled in this state that a party in contempt will not be heard on anything pertaining to the merits of the cause. *Mussina* v. *Bartlett*, 8 Port. 277; *Jacoby* v. *Goetter*, 74 Ala. 427; *Crabtree* v. *Baker*, 75 Ala. 91, 51 Am. Rep. 424; *Ex parte Pearce*, 111 Ala. 99, 20 South. 343.

"An order will therefore be entered striking appellee's application for rehearing from the files, and directing the issuance of an appropriate writ for the apprehension of the said appellee, that he may be brought before this court to show cause why he should not be punished."

In *Casebolt* v. *Butler* (Ky.), 194 S. W. 335, the court says (p. 336):

"We have therefore directly presented for decision the question of the authority of a circuit judge to deny a litigant the right to prosecute an effective appeal from a judgment or order against him when he is in continuing contempt of court by purposely and persistently failing and refusing to obey the order of the court from which he desires to prosecute the appeal.

"The exact question here presented is a new one

in this state, although a very analogous question was before this court in *Wilson* v. *Com.*, 10 Bush 526, 19 Am. Rep. 76. In that case, after holding that a convicted prisoner who had escaped would not be permitted to prosecute an appeal to reverse the judgment of conviction, this court, in dismissing the appeal, said:

"'It seems to us clear, both upon principle and authority, that the motion ought to be sustained. The court ought not to do a nugatory act; yet, if we proceed to try this appeal, the appellant cannot be compelled to submit to our decision if it should be against him, and ought not therefore to be allowed to reap the benefit of a decision in his favor. He might thus be enabled to defeat the ends of justice entirely, for he may be able to keep beyond the reach of the officers until by the death or removal of witnesses or other causes his conviction upon a second trial would be rendered improbable, if not impossible. As he has chosen to undertake to relieve himself by flight, in contempt of the authority of the court and of the law, he cannot also invoke the aid of this court.'

"A similar conclusion was reached in *Norton* v. *Com.*, 76 Ky. 501.

"In *Smith* v. *United States*, 94 U. S. 97, 24 L. ed. 32, the Supreme Court of the United States, in refusing to hear a criminal case on the appeal of the defendant who had escaped jail and was a fugitive, said:

"'In this case it is admitted that the plaintiff in error has escaped, and is not within the control of the court below, either actually, by being in custody, or constructively, by being out on bail. If we affirm the judgment, he is not likely to appear to submit to his sentence. If we reverse it and order a new trial, he will appear or not, as he may consider most for his

interest. Under such circumstances, we are not inclined to hear and decide what may prove to be only a moot case.'

"Other instructive cases on the subject of the right of a party in contempt to prosecute an appeal or to ask favors of the trial court are *Hovey* v. *Elliott*, 167 U. S. 409, 17 Sup. Ct. 841, 42 L. ed. 215; *Campbell* v. *Justices*, 187 Mass. 569, 73 N. E. 659, 69 L. R. A. 311, 2 Ann. Cas. 462; *Tyler* v. *State*, 3 Okla. Cr. 179, 104 Pac. 919, 26 L. R. A. (N. S.) 921; and *State* v. *Scott*, 79 Kan. 692, 79 Pac. 126, 3 Ann. Cas. 511. In the Ann. Cas., as well as in the L. R. A., there will be found full notes on this subject, and the unanimous opinion of the courts is that an appeal will not be entertained on behalf of a person convicted of crime who has escaped and is a fugitive from justice, although the practice in some states is to continue the matter of dismissal for a reasonable time in order to give the fugitive an opportunity to surrender himself.

"We see no reason why the practice announced in these criminal appeals should not be applied to the case in hand. Here the very party who is asking that the record be prepared so that he may prosecute an appeal is in contempt of court in refusing to obey the order from which he desires to appeal. In defiance of the court's orders, he has refused to deliver the child to its mother and has taken it to another state out of the jurisdiction of the court, so that the orders of the court cannot be enforced against him. If his appeal on a proper record should be brought to this court and the ruling of Judge Butler affirmed, there is no way by or through which the judgment of this court could be enforced. If the judgment was adverse to Casebolt, he would doubtless continue to keep the custody of the child and remain outside the jurisdiction of the court; but, if the judgment of this court was favorable to him, he would probably return with the child and submit himself to the juris-

diction of the court. In other words, the attitude of Casebolt is that:

"'If you decide the case in my favor, well and good, but, if you do not I will keep the child out of your reach, so that, no matter what the decision of the court may be, I will continue to have the custody of the child.'

"Under the circumstances such as these, we are clearly of the opinion that Casebolt should not be permitted to thus trifle with the court and so conduct himself as to make its orders and judgments a mere nullity unless he voluntarily saw proper to obey them."

The case of *Hovey* v. *Elliott*, 167 U. S. 409, is not in conflict with the authorities we have cited. In that case the court held that it was not within the power of the trial court to strike the defendant's answer from the files, and render judgment by default against him because he was in contempt, as that would be a denial of due process of law. In the opinion, however, the distinction is plainly drawn between that case and one in which a court denies affirmative relief to a party who is in contempt. This is illustrated by the following sentences quoted from page 423:

"It is not at all unlikely that the restriction was upon the party coming before the court by way of motion seeking affirmative action by the court in his favor. It is certain that neither in the Register nor in Comyns is there a suggestion that a party, while in contempt for disobedience of an injunction, might, for such cause, be defaulted upon the merits."

And again the following from the same page:

> "The difference between the want of power, on the one hand, to refuse to one in contempt the right to defend in the principal case on the merits, and the existence of the authority, on the other, to refuse to accord a favor to one in contempt, is clearly illustrated by the whole line of adjudicated cases."

And the following quoted from page 424:

> "That in the time of Lord Clarendon the practice of the Court of Chancery was only to deny to a party in contempt the privilege of having favorable action taken by the court upon applications addressed to its discretion finds support, not only in the case of *Phillips* v. *Bucks*, *supra*, but also in a decision of Sir H. Grimston, Master of the Rolls, who, in refusing an application for relief against a sequestration of lands of the defendant following a decree, assigned, among other reasons, the following: '3dly the defendant not having performed the decree by the payment of the money, he shall not receive any favour from the court whilst he stands in contempt.' Bacon's Abridgment, Sequestration, C', the marginal reference being to a case entitled Sands v. Darrell."

And by the following quoted from page 430:

> "The conclusion which we have reached accords with that of Daniell, who in his Chancery Pleadings and Practice (vol. 1, pp. *506) says:
>
> "'Besides the personal and pecuniary inconvenience to which a party subjects himself by a contempt of the ordinary process of the court, he places himself in this further predicament, viz.: That of not being in a situation to be heard, in any application which he may be desirous of making to the court. Lord Chief Baron Gilbert lays it down, that 'upon

this head it is to be observed, as a general rule, that the contemnor, who is in contempt, is never to be heard, by motion or otherwise, till he has cleared his contempt, and paid the costs; as, for example, if he comes to move for anything, or desires any favor of the court ?* * *.'

"'The rule, that a party in contempt cannot move till he has cleared his contempt, is, in practice, confined to cases where such party comes forward voluntarily and asks for an indulgence; and, therefore, a defendant cannot object to a cause being heard because the plaintiff is in contempt. So a defendant in contempt is entitled to production of documents.'"

Hammond Packing Company v. *Arkansas*, 212 U. S. 322, upheld an Arkansas statute which authorized the court to strike from the files the pleadings of a defendant failing to comply with the terms of an order requiring the production of witnesses, books and papers. At page 351 it is said:

"As pointed out by the court below, the law of the United States as well as the laws of many of the States, afford examples of striking out pleadings and adjudging by default for a failure to produce material evidence, the production of which has been lawfully called for. Rev. Stat. U. S. Sec. 724, which was drawn from Sec. 15 of the Judiciary Act of 1789, after conferring upon courts of law of the United States the authority to require parties to produce books and writings in their possession or under their control which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceedings in chancery, expressly empowers such courts, if a plaintiff fails to comply with the order to render a judgment of non-suit, and if a defendant

fails to comply 'the court may, on motion, give judgment against him by default.' From the time of this enactment, practically coeval with the Constitution, although controversies have arisen as to its interpretation, no contention, so far as we can discover, has ever been raised questioning the power given to render a judgment by default under the circumstances provided for in the statute."

Third.

The Act of the Legislature is primarily designed to protect the health of railroad employees and their families.

Section 3482 provides that railroad shops and division points which have been located for as much as five years shall not be moved without the permission of the Corporation Commission.

Section 3483 outlines the procedure before the Corporation Commission on application for removal.

Section 3484 provides that when such an application is filed:

"* * * The Commission shall hear evidence on the relative efficiency and expense of handling traffic through the proposed terminal as compared with the present facilities, and shall consider all other facts and circumstances affecting the various interests involved * * *."

It further provides:

"* * * That the Commission shall hear evidence and make a finding of fact as to the sanitary and habitable conditions of the proposed location with reference to whether the same would endanger the health

of the employees of said applicant or their families
* * *"

And the Commission shall deny the application if the removal * * * would endanger or injuriously affect the health of the employees of said applicant or their families."

Section 3345 imposes the burden of proof on the railway company.

It is obvious that this statute is an exercise of the power of the State to protect the health of railroad employees and their families by preventing railroads from moving terminals which have been located for a long time into a new location which is unhealthy and which endangers the health and safety of railroad employees and their families. The Act has no relation to the location of new division points or new shops. It only applies to those which have been voluntarily selected by the railway company, and which have been used for as much as five years. It does not prevent a change of location even under such conditions. It merely prevents a removal to an unhealthy location. It does not affect the movement of interstate commerce or of interstate commerce cars, except as they may be incidentally affected by preserving the health and safety of the employees. Assuming that the new location is a healthy one, it is obvious that it is the duty of the Corporation Commission to permit the move if the relative

efficiency and expedition of handling traffic through the proposed terminal" is an improvement.

Fourth.

A State may legislate to protect the health of railroad employees.

Legislation under the police power need not apply directly to every inhabitant of a state, but may apply only to those who come within the class affected. The power of governments, both national and state, to legislate in the interests of railway employees has been too often exercised to admit of debate.

In *Napier v. Atlantic Coast Line Railway Company*, 272 U. S. 605, the court has specifically announced the rule here laid down. The question involved in that case was whether the Federal Locomotive Boiler Inspection Act has superseded a Georgia statute prescribing an automatic door to the firebox of engines, and a Wisconsin statute prescribing cab curtains for the use of engines. Prior to the enactment of the Federal Act, similar state statutes had been held valid, but the court held in this case that the Federal Act had occupied the field and rendered state statutes on the same subject invalid. The opinion, however, lays down the rule definitely for which we are contending, the court saying, at page 610:

> "Each device was prescribed by the state primarily to promote the health and comfort of engineers and

firemen. Each state requirement may be assumed to be a proper exercise of its police power, unless the measure violates the commerce clause."

And, again, on page 611 the court says:

"The requirements here in question are, in their nature, within the scope of the authority delegated to the Commission. An automatic fire door and an effective curtain may promote safety. Keeping firemen and engineers in good health, like preventing excessive fatigue through limiting the hours of service, clearly does so, although indirectly, and it may be found that to promote their comfort would likewise promote safety."

The state statutes involved in that case were held invalid, but not because the state did not have the power to enact them. The power to enact them was clearly conceded. They were held invalid merely because the Federal Act had occupied the field.

Clearly, therefore, the state has power to legislate to protect the health of railroad employees and their families, and this Act is a valid exercise of the state's police power unless it comes into direct conflict with some Act of Congress or with the Constitution.

Fifth.

There is no Act of Congress relating to the subject covered by this Act.

We state this point without argument. It is the mere statement of a negative. There is nothing in the Transportation Act or in any other Act of Congress relat-

ing to the subject. There was no contention made in the lower court that there was any such Congressional legislation, and we assume that no such contention will be made here.

In *Railroad Commission of California* v. *Southern Pacific Company*, 264 U. S. 321 (The Los Angeles Union Station case), this Court recognized a much broader power as still left to State Commissioners when it said, page 345:

> "One might, too, readily conceive of railroad crossings or connections of interstate carriers in which the exercise by a state commission of the power to direct the construction of merely local union stations or terminals without extensions of main tracks and substantial capital outlay should be regarded as an ordinary exercise of the police power of the state."

In this quotation the Court recognizes the existence, notwithstanding the Transportation Act, of the power of state commissions to direct the construction of "merely local union stations or terminals."

If this power is left in the state commissions there is certainly nothing in the Transportation Act which can in any way affect the act of the legislature now involved, as it requires nothing in the way of construction but merely prevents the removal of division points and shops to an unhealthy location.

Sixth.

The Act here involved does not conflict with the commerce clause of the Constitution.

International & Great Northern Railway Company v. Anderson County, 246 U. S. 424:

That case involved a number of points not material here. It did involve, however, the validity under the commerce clause of the Office Shops Act of the Texas Legislature, and it held that that act was valid. We think that case is conclusive of the validity of this act. The act of the Texas Legislature involved in that case is described in the opinion of the Court, at page 430, as follows:

> "Act, approved March 27, 1889, c. 106; Rev. Civil Stats. 1911, Sec. 6423, provided that every railroad company chartered by the state or owning or operating a line within the state should permanently maintain its general offices at the place named in its charter, and if no certain place were named there, at such place as it should have contracted to locate them, otherwise at such place as it should designate; also that it should maintain its machine shops and roundhouses at the place where it had contracted to keep them, and that if the offices, shops or roundhouses were located on the line of a railroad in a county that has aided such railroad by an issue of bonds in consideration of the location being made, then such location should not be changed; 'and this shall apply as well to a railroad that may have been consolidated with another as to those which have maintained their original organization.' A violation of the act entails forfeiture of the charter, with a penalty of $5,000.00 a day for every day of violation."

We call attention to the fact that the Texas Act prohibited removal of general offices, machine shops and roundhouses. The Texas Act had no relation to the health of railroad employees, but was a prohibition against removal. The Oklahoma Act does not prohibit the removal of shops and division points, but provides a method for removal. The only circumstances under which a removal is prevented are when the health and safety of the railroad employees and their families are involved. If the Texas Act was valid, it therefore follows that there is no doubt about the validity of the Oklahoma Act, because if a state can prohibit the removal of shops without regard to the health of the employees, then it can certainly prevent the removal of shops to a place where the health of the employees and their families is threatened.

Again, in the Texas Act there was no provision for an inquiry by the commission. There was a mere prohibition against the removal, while in the Oklahoma Act the removal is permitted after an inquiry and upon a finding that the health of the employees is not endangered.

The Texas Act was attacked as a burden on interstate commerce, and this Court, in passing on that question, says (p. 433):

> "The acceptance of the charter by the plaintiff in error disposed of every constitutional objection but one. It is said that the restriction imposes a burden

upon commerce among the states, since the road concerned has expanded and now is largely engaged in such commerce. The jury found that it imposed no burden, upon an issue submitted to them in accordance with the desire of the plaintiff in error, although not in the form that it desired. So far as the question depended upon the testimony adduced the verdict must be accepted, and although no doubt there might be cases in which this court would pronounce for itself, irrespective of testimony, whether a burden was imposed, we are not prepared to say that in this instance the state has transcended its powers."

We think this decision is decisive of the issue.

On this appeal the question is whether in this instance the State has transcended its powers. The Texas statute was an absolute prohibition, while the Oklahoma statute is not a prohibition but a mere requirement that, before the move is made, application must be made to the Corporation Commission, a hearing had, and the facts determined as to whether or not the new location is a healthy one, and whether or not the move is in the interest of public convenience and economy of operation. If a prohibitory statute is valid, then certainly a permissive statute with conditions is valid.

The question involved on this appeal is not whether the railway company had made a showing upon which the Corporation Commission should give it permission to move its shops, but the question is whether the statute is valid. If the statute is valid, then the railway company is

not entitled to relief in the Federal courts until it has complied with the statute. It cannot ignore the statute and ignore the Corporation Commission, and proceed in the Federal courts on the assumption that the Commission would deny it relief if a proper showing were made. It must obey the law.

The argument of the railway company is that it can save money by moving. For the purpose of this case, let us admit it. But it could make this showing as conveniently to the Corporation Commission as it could to the Federal court. Suppose, on the other hand, we could prove that the railway company is making a mistake and that it will lose money by moving. Would that in any way affect the validity of the statute? Whether the railway company gains by the move or whether it loses by the move in no wise affects the regulatory power of the State. It merely is an argument one way or the other.

The simple fact is that the railway company has not complied with the orders of the Commission, but instead of doing so, that it has ignored the statute and has rushed into the Federal court without any effort to obey the statutory requirements or set aside the orders of the Commission. We discuss elsewhere the effect of the abortive application of the railway company requesting the Commission to ratify its unlawful removal.

In considering the constitutionality of this statute, the question involved is not whether in this particular case the railway company could make a showing justifying removal, but whether under any state of facts the statute is valid. If the State has the right to prevent railway companies from moving their shops and division points to unhealthy locations and/or to prevent railway companies from moving their shops and division points when the removal would involve increased expense of operation, then this statute is valid. It is, of course, possible that the Corporation Commission might make an order under the statute which would be invalid. It is possible that it might make an order which would be wholly arbitrary and unreasonable, and which the Federal courts would regard as depriving the railway company of its constitutional rights. There is a broad distinction between the validity of this statute and the validity of any order which the Commission might make under the statute. The sole question now presented is whether the statute is valid, not whether the railway company, by proceeding under the statute, could eventually establish its right to remove. If the statute is valid, this action must fail, and whether or not the railway company can procure an order from the Commission permitting its removal is not the question now involved, and is wholly immaterial.

We, therefore, ignore the argument of expense.

Seventh.

Laws passed by a State in the exercise of its police powers are valid, even though they indirectly affect interstate commerce.

The principles involved are clear, and the only difficulty is in their application. The states within their proper sphere are sovereign. The United States within their proper sphere are sovereign. Congress has the power to regulate interstate commerce. It was originally thought that until Congress acted, the state might act even in the regulation of interstate commerce. License cases 5 Howard 504. But this doctrine was subsequently overruled in *Leisy* v. *Hardin*, 135 U. S. 100. Although in that case there was a very able dissenting opinion by Justices Gray, Harlan and Brewer, it may now be taken as a settled rule that state legislation must not regulate interstate commerce. On the other hand, the states never surrendered their police power to the United States. Their power to protect and preserve the health, the morals, the welfare and the safety of their people has never been surrendered. They may in the exercise of this power and in the absence of Congressional legislation absolutely prohibit interstate commerce. For example, the States may prohibit the importation of diseased cattle. *M., K. & T. R. R. Co.* v. *Haber*, 169 U. S. 613. They may prohibit the running of freight trains on Sunday. *Hennington* v. *Georgia*, 163 U. S. 299. Similar legislation has been sus-

tained in a number of cases hereafter cited. The real question for consideration in every case is whether the legislation of the state is reasonably related to its declared object. If it is, or if the question is fairly debatable, the act is valid. For example, this Court in *Village of Euclid* v. *Ambler Realty Company*, 272 U. S. 365, says, page 388:

> "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."

Again, at page 395, the Court says:

> "If these reasons, thus summarized, do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least, the reasons are sufficiently cogent to preclude us from saying, as it must be said *before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.*"

Again, the Court said in *Graves* v. *Minnesota*, 272 U. S. 425, at page 428:

> "By enacting the present statute the State has determined, through its legislative body, that to safeguard properly the public health it is necessary that no one be licensed to practice dentistry who does not hold a diploma from a dental college of good standing. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute."

Again, in *Massachusetts State Grange* v. *Benton*, 272

U. S. 525, at page 527, the Court, in upholding the daylight saving act, said:

> "But it also went on the important rule, which we desire to emphasize, that no injunction ought to issue against officers of a State clothed with authority to enforce the law in question, unless in a case reasonably free from doubt and when necessary to prevent great and irreparable injury."

We do not think there is any doubt about the Oklahoma statute being passed to protect the health and safety of railroad employees, and not as a regulation of commerce of any kind. It certainly cannot be said that it is clear that this is not so. It, therefore, follows under the rules laid down by this Court that this injunction should not issue. The shops and division point in this case have been located at Sapulpa since the railroad was constructed, and to leave them there long enough for the railway company to apply to the Commission for an order certainly would not have imposed on the railway company "great and irreparable injury." Having been there thirty-five years they might easily remain there a few months longer without materially injuring the railway company.

Bearing in mind these rules resolving the doubt in favor of the statute, we call attention briefly to a number of cases in which state legislation has been sustained against an attack under the commerce clause.

In *The Mayor of New York* v. *Miln*, 11 Peters 102, in

sustaining a statute of New York requiring the master of a vessel arriving from a foreign port to report to the Mayor an account of his pasengers, the Court, in discussing the commerce clause, says (p. 139):

"There is, then, no collision between the law in question and the acts of congress just commented on; and, therefore, if the state law were to be considered as partaking of the nature of a commercial regulation, it would stand the test of the most rigid scrutiny, if tried by the standard laid down in the reasoning of the court, quoted from the case of Gibbons vs. Ogden.

"But we do not place our opinion on this ground. We choose rather to plant ourselves on what we consider impregnable positions. They are these: That a State has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a State to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends, where the power over the particular subject, or the manner of its exercise, is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a State is complete, unqualified, and exclusive.

"We are aware that it is at all times difficult to define any subject with proper precision and accur-

acy; if this be so in general, it is emphatically so in relation to a subject so diversified and multifarious as the one which we are now considering.

"If we were to attempt it, we should say that every law came within this description which concerned the welfare of the whole people of a State, or any individual within it; whether it related to their rights, or their duties; whether it respected them as men, or as citizens of the State; whether in their public or private relations; whether it related to the rights of persons, or of property, of the whole people of a State, or of any individual within it; and whose operation was within the territorial limits of the State, and upon the persons and things within its jurisdiction."

In *Smith v. Alabama*, 124 U. S. 465, the Court sustained an Alabama statute requiring locomotive engineers to be examined and licensed by a Board appointed by the State.

In *Nashville, Chattanooga & St. Louis Ry. v. Alabama*, 128 U. S. 96, the Court sustained a statute requiring locomotive engineers to pass an examination showing their ability to discriminate between colors, and requiring the railway companies to pay a fee for the examination.

In *Plumley v. Massachusetts*, 155 U. S. 461, a statute was sustained prohibiting the sale of oleomargarine artificially colored.

In *Western Union Telegraph Co. v. Jones*, 162 U. S.

ute, a Georgia statute was sustained penalizing telegraph companies for negligent delay in delivering messages.

In *Brimmer v. Rebman*, 138 U. S. 78, a statute was sustained prohibiting the running of freight trains on Sunday.

In *New York, New Haven & Hartford R. R. Co. v. New York*, 165 U. S. 628, a statute was sustained regulating the heating of steam passenger cars, although the argument was made that different States might prescribe different regulations, thereby obliging a train running through two or more States in order that the railroad might comply with conflicting regulations.

In *Kansas, Missouri & Texas Coal R. R. Co. v. Atkinson*, 169 U. S. 366, an Iowa statute was sustained which provided that no contract shall exempt any railroad from the liability of a common carrier, even as applied to interstate commerce.

In *Missouri, Kansas & Texas Ry. Co. v. Haber*, 169 U. S. 613, a Kansas act was sustained prohibiting shipment into Kansas of diseased animals.

In *Patapsco Guano Co. v. North Carolina Board of Agriculture*, 171 U. S. 345, an act was sustained which provided for the inspection of fertilizers coming into the State in interstate commerce, and imposing an inspection fee

In *Lake Shore & Michigan Southern Ry. Co. v. Ohio*, 173 U. S. 285, a statute was sustained requiring railroad companies to stop at least three of their trains at every town containing three thousand inhabitants.

In *Ex parte Koiranski*, 109 U. S. 265, a city ordinance was sustained limiting the speed of interstate trains within the city limits.

In *Reid v. Colorado*, 187 U. S. 137, a statute was sustained prohibiting the introduction of diseased cattle or horses.

In *Crossman v. Lurman*, 192 U. S. 189, a New York statute was sustained prohibiting the sale of adulterated food and drugs, although moving in interstate commerce.

In *New Mexico v. Atchison, Topeka & Santa Fe Ry. Co.*, 203 U. S. 38, a territorial statute was sustained prohibiting a railroad company exercising the power to cross the tracks of the grantors, unless cities had not been incorporated.

In *Reid v. Colorado*, 187 U. S. 137, a statute was sustained which prohibited the transportation of cattle into the state from the south, except for immediate slaughter, which had not been proved as healthy by the proper state officials or by the National Bureau of Animal Industry.

In *Atlantic Coast Line Railroad Co. v. Watcrodo*, 235 U. S. 177, a South Carolina statute was sustained re-

quiring railroads within a specified time to settle claims for loss or damage to freight, even as applied to interstate shipments.

In *Western Union Telegraph Co. v. Commercial Milling Co.*, 218 U. S. 406, a Michigan statute was sustained fixing the liability of telegraph companies for non-delivery of interstate as well as intrastate messages.

In *Chicago, Rock Island & Pacific Ry. Co. v. Arkansas*, 219 U. S. 453, the full crew law was sustained as applied to interstate trains.

In *Western Union Telegraph Co. v. Crove*, 220 U. S. 364, a Virginia statute was sustained imposing a penalty on telegraph companies for failure to perform a common law duty, even as applied to interstate messages.

In *Red "C" Oil Co. v. North Carolina*, 222 U. S. 380, an oil inspection statute was sustained as applied to interstate shipments.

In *Savage v. Jones*, 225 U. S. 501, an Indiana statute was sustained regulating the sale of concentrated commercial feeding stuff, as applied to interstate commerce, although the Federal Food and Drugs Act was then in effect.

In *Grand Trunk Ry. Co. v. Michigan Railroad Commission*, 231 U. S. 457, an order of the Commission was sustained requiring certain railroads doing an interstate

business to use their tracks within the city limits of Detroit for the interchange of intrastate traffic.

In *Atlantic Coast Line Railroad Company* v. *Georgia*, 237 U. S. 280, a statute was sustained requiring railroads to use locomotive headlights of specified form and power, although it was argued that different requirements might be passed by different states, thus requiring railroad locomotives to have different headlights on two sides of the imaginary state line.

In *Sligh* v. *Kirkwood*, 237 U. S. 52, a Florida statute was sustained prohibiting shipment of immature citrus fruits.

In *Armour & Co.* v. *North Dakota*, 240 U. S. 510, a statute was sustained requiring lard to be put up in pails containing a specified number of pounds, even as applied to shipments from other states.

In *Pure Oil Co.* v. *Minnesota*, 248 U. S. 158, a statute was sustained providing for the inspection of illuminating oils and gasoline while yet in interstate transit, and imposing an inspection fee.

In *Merchants Exchange of St. Louis* v. *Missouri*, 248 U. S. 365, a statute was sustained which prohibited any person other than a duly authorized and bonded State Weigher, from issuing weight certificates for grain weighed at any warehouse or elevator where State Weigh-

ers were sustained, even as applied to interstate shipments.

In *Corn Products Refining Co.* v. *Eddy*, 249 U. S. 427, a regulation by the State Board of Health was sustained requiring proprietary foods imported into the State and sold in original packages to bear labels stating the names and percentages of the ingredients.

In *South Covington & Cincinnati Street Ry. Co.* v. *Kentucky*, 252 U. S. 399, a separate coach law for white and colored passengers was sustained.

In *Western & Atlantic R. R. Co.* v. *Georgia Public Service Commission*, 267 U. S. 493, a rule was sustained providing that switching service shall not be discontinued without the consent of the Commission, even as applied to interstate commerce.

Eighth.

Imposing the burden of proof on the Railway Company is a valid provision.

The argument was made in the lower court that this provision renders the act invalid. On this point we content ourselves with citing *James Dickinson Farm Mortgage Company et al.* v. *Harry*, 273 U. S. 119.

Ninth.

It was the duty of the District Court to require the Railway Company to return its shops and division point to Sapulpa.

The point is, of course, immaterial in the event of an

affirmance, but, if there is a reversal, it becomes important. We, therefore, present the question at this time.

It will be noticed that the statute involved does not confer jurisdiction upon the Corporation Commission to require the railway company to restore the *status quo*. The power conferred upon the Commission is to consider the application of a railway company for permission to move, which, of course, it will grant or deny according to the facts.

If this case is reversed, then it follows that the railway company took advantage of the temporary injunction to do an unlawful act, and that it did it under the protection of an unlawful order. Obviously, therefore, the court which permitted the wrong to be done is the court which should correct the wrong. If not, why not? If the trial court is not the proper tribunal to correct the wrong, where shall the defendants go for relief? This Court, in reversing the previous order of the Commission, at 274 U. S. 594, says this:

> "The effect of the Commission's restraining order was merely to keep things in *statu quo* until the final hearing in the federal court. The interlocutory decree set the Railway free to move the shops before the case could be heard on final hearing. By ending the *status quo* which had existed for ten years, it exposed the city and its citizens to danger of irreparable loss. The change subjected Sapulpa to grave and immediate peril. Removal of the shops which had been located in Sapulpa for a generation would probably affect

> property values seriously and might bring disaster in its train. It might ruin business. It might result in unemployment. It might compel many of Sapulpa's citizens to seek homes elsewhere. On application for an interlocutory injunction such considerations are of weight."

The irreparable damage to the City of Sapulpa has been done and the evils which this Court pointed out as possible have become an accomplished fact, and all of this has been done by the railway company defiantly, arbitrarily, and in violation of the orderly procedure which this Court in its former opinion says should have been followed.

But the railway company says that it would cost it a large sum of money to move back to Sapulpa. Granted. If great corporations can flout the law and avoid restitution because the correction of their disobedience would be expensive, then the administration of justice must yield to the convenience of him who violates the law in large affairs, while the small man who only violates the law in small affairs would be the only one compelled to correct the wrong he has done.

But the railway company says, and the three judges in their opinion say, that the defendants (appellants) had the privilege of making a bond in order to prevent the temporary injunction from becoming effective, and that, therefore, they are not in a position to complain.

Would the members of the Corporation Commission, and the Attorney General of Oklahoma, and two citizens, of Sapulpa subject themselves to a possible great personal liability in order to correct a wrong done by the trial court? We submit that it was unnecessary for them to expose themselves to this personal risk, and that they discharged their full duty by diligently prosecuting the appeal to this Court.

Tenth.

It is well settled that on reversal of a judgment restitution will be ordered.

A leading case announcing this doctrine is *Northwestern Fuel Company* v. *Brock*, 139 U. S. 216. In that case the plaintiff recovered judgment against the defendant. The defendant appealed without superseding the judgment. The lower court ordered the plaintiff to return the money, although the decision of the Supreme Court was not based on its merits but on the want of jurisdiction in the lower court. It was contended by the plaintiff that as the court was without jurisdiction of the case, that it had no power to award restitution to the defendant or to have execution issued therefor. The question, therefore, which was decided was whether or not a court by whose process money had been illegally collected could, when it was ascertained that the court had no jurisdiction of the cause, issue execution to compel restitution.

The argument was made that if the court did not have jurisdiction it could not order restitution and could not issue execution. Justice Field wrote the opinion, in the course of which he says (p. 219):

> "The right of restitution of what one has lost by the enforcement of a judgment subsequently reversed has been recognized in the law of England from a very early period, and the only question of discussion there has been as to the proceedings to enforce the restitution. Thus in *Anonymous*, 2 Salk 588, it was held by Holt, C. J., that 'Where the plaintiff has execution, and the money is levied and paid, and that judgment is afterwards reversed, there, because it appears on the record that the money is paid, the party shall have restitution without a *scire facias*, and there is a certainty of what was lost; otherwise where it was levied but not paid; there must then be a *scire facias* suggesting the matter of fact, viz., the sum levied, etc.'
>
> "The same doctrine has been fully recognized by this court in *Bank of the United States* v. *Bank of Washington*, 6 Pet. 8, 17. *In that case the court, after observing that the party against whom an erroneous judgment has been enforced does not lose his remedy against the party to the judgment, said: 'On the reversal of the judgment the law raises an obligation in the party to the record, who has received the benefit of the erroneous judgment, to make restitution to the other party for what he has lost;* and the mode of proceeding to effect this object must be regulated according to circumstances. Sometimes it is done by a writ of restitution, without a *scire facias*, when the record shows the money has been paid, and there is a certainty as to what has been lost. In other cases a *scire facias* may be necessary to ascertain what is to be restored. 2 Salk. 587-8; Tidd's Pract. 936,

> 1137-8. And, no doubt, circumstances may exist where an action may be sustained to recover back the money.' We are of the opinion that the proceedings to enforce the restitution in the cases mentioned is under the control of the court, and that *all needed inquiry can be had to guide its judgment in a summary proceeding, upon motion of the parties, the only requisite being that the opposite party shall be heard*, so that in directing restitution no further wrong be committed. The restitution is not made to depend at all upon the question whether or not the court rendering the judgment reversed acted within or without its jurisdiction."

In this connection the concurring opinion by Justice Brewer is interesting, and is as follows (p. 221):

> "I had supposed the law to be otherwise, and that if the Circuit Court did not have jurisdiction by reason of a lack of proper citizenship of the parties to render a judgment in favor of the plaintiff against the defendant, it was equally without jurisdiction thereafter in the same case and without any change in the citizenship to render a judgment in favor of the defendant against the plaintiff. But the result is so manifestly equitable I am glad to know that I was mistaken, and that the law is as it is now adjudged to be."

This case settles the point now in controversy. Here the railway company "has received the benefit of the erroneous judgment", and to require the railway company to restore the *status quo* "is so manifestly equitable" that the result should not be in doubt. Unless the *status quo* is restored the railway company secures the benefits of a valid judgment, whereas the judgment has been de-

clared by the Supreme Court to be erroneous. It is impossible to conceive of anything more unjust than to leave the railway company in the possession of rights under the erroneous interlocutory decree.

Arkadelphia Milling Company v. *St. Louis Southwestern Railway Company*, 249 U. S. 134, is likewise directly in point.

In that case the railway company secured a temporary injunction against the Arkansas Railway Commission restraining it from enforcing its schedule of rates. This injunction was continued in force until the final hearing, when it was made permanent.

Appeals were taken to this Court, and the decision of the lower court was reversed. The District Court then entered decrees dismissing the bills and ordering a reference to a special Master for the purpose of determining the damages. Shippers were allowed to intervene for the purpose of securing refunds of the excess rates collected under the injunction, and a decree was entered giving to the shippers the relief they sought. This Court held that as to excessive charges made while the temporary injunction bonds were in effect that recovery could be had against the railway company and the sureties on its bond, but as to excess charges collected under the final decree, which amongst other things discharged the bond,

that the judgment could only run against the railway company itself. At page 145 the Court says :

"But in our opinion, this portion of the claims is allowable against the railway companies themselves upon the principle, long established and of general application, that a party against whom an erroneous judgment or decree has been carried into effect is entitled, in the event of a reversal, to be restored by his adversary to that which he has lost thereby. This right, so well founded in equity, has been recognized in the practice of the courts of common law from an early period. Where plaintiff had judgment and execution and defendant afterwards sued out a writ of error, it was regularly a part of a judgment of reversal that the plaintiff in error 'be restored to all things which he hath lost by occasion of the said judgment'; and thereupon, in a plain case, a writ of restitution issued at once; but if a question of fact was in doubt, a writ of *scire facias* was first issued. *Anonymous*, Salk. 588, citing *Goodyere* v. *Ince*, Cro. Jac. 246; *Sympson* v. *Juxon*, Cro. Jac. 698; *Vesey* v. *Harris*, Cro. Car. 328; see also Lil. Ent. 641, 650; Arch. Append. 195, 200. The doctrine has been most fully recognized in the decisions of this court. *Bank of the United States* v. *Bank of Washington*, 6 Pet. 8, 17; *Ervien* v. *Lowry*, 7 How. 172, 184; *Northwestern Fuel Co.* v. *Brock*, 139 U. S. 216.

"That a course of action so clearly consistent with the principles of equity is one proper to be adopted in an equitable proceeding goes without saying. It is one of the equitable powers, inherent in every court of justice so long as it retains control of the subject-matter of the parties, to correct that which has been wrongfully done by virtue of its process. *Northwestern Fuel Co.* v. *Brock*, 139 U. S. 216, 219; *Johnston* v. *Bowers*, 69 N. J. L. 544, 547.

"It is argued that the claimant is not in a posi-

tion to invoke the principle of restitution in this proceeding because it was not a party to the original proceedings, but came in by intervening before the master. This point is unsubstantial. The railroad commission, in defending the rate schedules against the attack of the railway companies, represented all shippers; the permanent injunctions that were awarded by the final decrees restrained all shippers from taking advantage of the commission rates; and during the time that those decrees remained unreversed the railway companies obtained the benefit of the injunction by exacting from this claimant, among others, in addition to the commission rates, those excess charges that form the basis of the present claims. It is a typical case for the application of the principle of restitution; and the district court properly held the commission to be the representative of the shippers for this purpose."

It follows from these two decisions of this Court that everything taken under an erroneous decree must be restored, that the parties must be placed in *statu quo*, and that plaintiff can take no advantage by reason of the erroneous decree. In our case the only way in which to restore the *status quo* is to require the railway company to move its shops and division point back to Sapulpa. It would be a mockery of justice and abuse of the power of the court, and a reflection on the principles of equity jurisprudence to allow the railway company to retain the advantages which it has secured by reason of the erroneous order. It has not taken any money which may be restored. It has not taken any property which may be restored. It has merely invaded the rights of the de-

formants, and the only way in which it can make restitution is to protect those rights.

Other cases laying down the rule and applying it to various sets of facts are as follows:

St. Louis Southwestern Ry. Co. v. Texas &c. Consolidated Ry. Co., 200 S.W. 410 (writ ref. N.R.E.).

Kansas City Southern Ry. Co. v. Southern Express Company, 279 S.W. 1077 (writ ref. N.R.E.).

Memphis v. Cox, 20 Fed. 670.

Lake Shore &c. R. Co. v. Pacific R.R., 25 N.Y. 566.

Mississippi v. Mississippi, 11 How. App. 475.

Atlantic Coast Line R. Co. v. Richmond &c. Lines R. Co., 206 U.S. 1, 51 L. Ed. 933.

Morris v. Gross, 32 Wis. 494.

In High on Injunctions, Fourth Edition, in paragraph 34 the rule is laid down as follows:

> "Since the object of a preliminary injunction is to preserve the status quo, the court will not grant such an order where its effect would be to change the status. Thus, where the plaintiff seeks to enjoin the defendant from interfering with acts about to be done by the plaintiff against the objection of the defendant, a preliminary injunction restraining such interference is erroneous, since its effect is to destroy the existing condition of the subject matter of the suit by permitting the doing of affirmative acts by the plaintiff in advance of the final determination of his right to do them. And in such case the court may compel the plaintiff, who, after having had defendant's goods, has thus changed the status of affairs, to restore them to the same condition as that in which they were before the injunction was granted. And by the status quo which

will be prevented by preliminary injunction is denied the first motion, provided, nevertheless, such denial will be without prejudice to the right of the moving party to make a subsequent motion for such preliminary injunction, if he can show that there has been a substantial change in the circumstances existing at the time of the first motion, which would entitle him to the relief sought. In other words, the denial of the first motion is not to be considered as a decision on the merits of the controversy, but only as a decision that the moving party has not, at the time of the motion, made out a sufficient case to entitle him to the relief sought. Such a decision is not binding upon the court in subsequent proceedings, and the court may, upon a subsequent motion, grant the relief sought, if the moving party can show that there has been a change in the circumstances existing at the time of the first motion, which would entitle him to the relief sought. In other words, the denial of the first motion is not to be considered as a decision on the merits of the controversy, but only as a decision that the moving party has not, at the time of the motion, made out a sufficient case to entitle him to the relief sought. Such a decision is not binding upon the court in subsequent proceedings, and the court may, upon a subsequent motion, grant the relief sought, if the moving party can show that there has been a change in the circumstances existing at the time of the first motion, which would entitle him to the relief sought.

Discussion.

The motion to require the Railway Company to endure the status quo should have been heard by the District Judge, and it was error for the three judges to sit.

The point, it will probably not arise in this Court. If this Court should reverse the lower court and direct motion to be made, the lower court will of course, rule it whether the district judge will alone or whether the three judges sit. In the event of a reversal without a decision on the point last discussed, this point may require a decision, and it is only in the face of that possibility that we present the argument, although we felt at the time, and still feel, that it was necessary for the other two judges to participate in the hearing of that motion.

Section 266, United States Civil Judicial Code, as amended, provides the circumstances under which three judges must sit. It requires the presence of three judges at the hearing of an application for an interlocutory injunction, and authorizes an appeal direct to this Court from an order granting or denying an interlocutory injunction. By the amendment of February 11, 1925, the following clause was added to this section:

> "The requirement requiring the presence of three judges shall also apply to the final hearing in such suit in the district court, and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

It will thus be noted that there are only two occasions on which three judges must be present. One, the hearing of the application for an interlocutory injunction, and the other, the final hearing.

In all intermediate steps the district judge has authority to act. There are, of course, numerous intermediate steps between the interlocutory injunction and the final hearing; there may be motions to make the bill more specific and certain; there may be applications for a continuance; there may be applications to ascertain the damages which the defendants are entitled to recover from the plaintiff on its injunction bond, and there will be whatever proceedings are usual and incident to the progress of a lawsuit between the time it is filed and the time it is finally heard.

Under the law one of the three judges must be a Justice of the Supreme Court of the United States, or a Circuit Judge, and the other District Judge may be called in from a distant state. Is it going to be necessary to call on a Justice of the Supreme Court or a Circuit Judge, and a District Judge from such a long distance, to hear every application that may arise in this case during the next two or three years? To ask these questions is to answer them. It was not the intention of Congress to so greatly inconvenience the administration of justice, to so greatly inconvenience the Justices of the Supreme

Court, and the Circuit Judges, and the other District Judges. It was not the intention of Congress to so greatly inconvenience the parties to the litigation. It was not the intention of Congress to delay and frustrate the administration of justice by prescribing impossible machinery. On the contrary, it was the intention of Congress, as appears on the face of the Act, to expedite and not delay the matter.

This Court has applied a rule of strict construction to this section of the Judicial Code, and has held that it is limited to the specific terms of the Act.

For example, in *Moore, Insurance Commissioner, v. Fidelity & Deposit Company*, 272 U. S. 317, the Court held that a direct appeal to the Supreme Court would not lie under this statute unless the application for a preliminary injunction had been pressed, and that unless the application for a preliminary injunction had been pressed, three judges were not necessary for the final hearing. In that case the specific question involved was whether a direct appeal could be taken to the Supreme Court from a final decree where the application for the interlocutory injunction had not been pressed. In deciding that the appeal did not lie the Court said (p. 320):

> "The act of 1925 applies, as the decree of which review is sought was entered after May 13, 1925. Among the provisions enumerated in Section 238 as amended in Section 266 of the Judicial Code (Comp.

St. Sec. 1243). It is contended that this case falls within the latter section. It was amended by the addition of the following provision: 'The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit.'

"Appellant contends that this appeal lies under Section 266, because the order of the insurance commissioner is an order of an administrative board, and the suit is one which seeks relief by way of interlocutory injunction suspending or restraining the enforcement * * * of an order made by an administrative board * * * acting under and pursuant to the statutes of such state, * * * upon the ground of unconstitutionality, * * *.

"In the case at bar there was an attack upon the order of the insurance commissioner 'upon the ground of unconstitutionality,' within the meaning of Section 266. *Oklahoma Natural Gas Company* v. *Russell*, 261 U. S. 290, 292, 43 S. Ct. 353, 67 L. ed. 659. It may be assumed that the order was action of an administrative board within the meaning of that section. Compare *Fidelity & Deposit Company* v. *Tafoya*, 270 U. S. 426, 46 S. Ct. 331, 70 L. ed. —. But the prayer for the preliminary injunction was not pressed, nor was there any request that the case be heard by a court consisting of three judges, which would have been necessary under Section 266, if the prayer had been pressed. That section as originally enacted applied only where interlocutory relief was actually sought, regardless of the scope of the bill. Its purpose was to minimize, in an important class of cases, the delay incident to a review of a decree granting or denying an interlocutory injunction. The general purpose of the act of 1925 was to relieve this court by limiting further the absolute right to a review by it.

> There is nothing in the provision added by that act to Section 266 which indicates a purpose to extend the application of that section—either as to the requirement of three judges or as to the right to direct appeal—to a case in which an interlocutory injunction was not actually applied for. The occasion for the provision was considered in the Ruder case. It authorizes a direct appeal to this court from the final decree of the district court only where an application was made for an interlocutory injunction and the case was heard before three judges. Dismissed."

The Court here lays down the principle that this Section of the code is to be strictly construed and that three judges are not necessary except in the two specific cases provided, that is to say, when an interlocutory injunction is sought and thereafter when the case comes on for final hearing. All intermediate orders obviously must be made by the district judge.

Smith v. *Wilson*, 273 U. S. 388, was a case in which there has been no application for an interlocutory injunction, but in which three judges sat at the final hearing. A direct appeal was taken to the Supreme Court, and the court held that this was improper. The court likewise held that this section of the code did not require a court of three judges for the final hearing when there had been no application for an interlocutory injunction. In the opinion it is said (p. 389):

> "Section 266 before the amendment of February 13, 1925, required, as it still does, all applications

for an interlocutory injunction restraining state officers from enforcing state statutes or orders of administrative boards or commissions, upon the ground of unconstitutionality, to be heard by a court of three judges. But as the section then stood, the final hearing might be had before a single district judge who might arrive at a different conclusion from that reached on the preliminary hearing by the three judges, one of whom was a justice of the Supreme Court or a circuit judge. *Compare Patterson* v. *Mobile Gas Co.*, 271 U. S. 131, 46 S. Ct. 445, 70 L. ed. 870, and *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50, 42 S. Ct. 244, 66 L. ed. 458. To remove this anomaly and save the right of direct appeal to this court from the operation of the repealing provisions of the Act of February 13, 1925, Sec. 266 was amended by the addition of the following provisions:

"'The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit.'

"See *Ex parte Buder*, 271 U. S. 461, 465, 46 S. Ct. 557, 70 L. ed. 1036.

"It is to be noted that this amendment provides that the 'requirement' of a court of three judges 'shall also apply' to the final hearing 'in such suit.' The question now presented is whether the phrase 'such suit' was intended to refer only to a suit in which a preliminary injunction had been in fact sought or to a suit in which an application for such interlocutory injunction might have been but in fact was not made. Before the amendment the section applied only when interloctuory relief was actually sought, regardless of the scope of the bill, and direct appeal to this court was permitted only from the de-

termination of the court of three judges on such an application. The general purpose of the act of February 13, 1925 (43 Stat. 936), was to relieve this court by restricting the right to a review by it. *Moore* v. *Fidelity & Deposit Co.*, 272 U. S. —, 47 S. Ct. 105, 71 L. ed. —. The specific purpose of the amendment to Sec. 266, as already noted, was to end the anomalous situation in which a single district judge, on the final hearing might reconsider and decide questions already passed upon by the three judges on the application for an interlocutory injunction. Both purposes are accomplished if the amendment is taken as its language suggests, not to extend the application of the section with respect either to the requirement of three judges or the right of direct appeal to any case in which an interlocutory injunction is not sought. We conclude that the section as amended does not require a court of three judges on the final hearing unless an application for preliminary injunction is pressed to a hearing. In that case, an appeal whether from the determination or the preliminary application or from the final decree may be taken directly to this court. The plaintiff is thus given an election. He may either make application for an interlocutory injunction, which must be heard by three judges, in which case the final hearing must be heard before a like court with appeal directly to this court, or he may not press an application for an interlocutory injunction, in which case the hearing on the merits may be before a single judge, whose decision may be reviewed by the Circuit Court of Appeals and this court under other applicable provisions of the Judicial Code. Here there was not application for an interlocutory injunction and hence no necessity for a final hearing before three judges, although it may not have been erroneous for three judges to sit, a question we do not find it necessary to decide. There is therefore no jurisdiction in

this court to hear the appeal, which must accordingly be dismissed."

These two decisions of this Court clearly establish the rule of strict construction, and the application of that rule makes it obvious that three judges are unnecessary except in the specific cases required by law.

The responsibility for the decisions of the district court rests on the district judge, and so far as we know there is no provision of law authorizing other judges to take that responsibility away from him, or to overrule his authority. If three judges sit, necessarily two of them may decide the issue. It may be that the district judge entertains one opinion and the two visiting judges another. If so, the decision of the district court is rendered by two judges, neither of whom belongs in the district, and who thereby decide a case contrary to the opinion of the district judge who is responsible for that opinion.

United States Code Sec. 17 (Judicial Code Sec. 13 as amended), provides that under certain circumstances the senior Circuit Judge of a circuit may, if the public interest requires, assign a district judge to sit in another district, and Sec. 18 provides that such assigned judge may discharge all the judicial duties of the district judge in the district. Sec. 21 authorizes the senior Circuit Judge, when the public interest requires, to designate a district

judge to hold the district court in the place of, or aid of, any other district judge within the same circuit, and Sec. 22 provides for assigning a Circuit Judge to hold a district court, but none of these sections provide that the assigned judge shall sit with the district judge, and much less do they provide that any two assigned judges may out vote and thus displace the district judge.

In *Smith* v. *Wilson, supra*, there is a hint of impropriety in three judges sitting when the statute did not require it, the Court saying at the end of the opinion:

> "Here there was no application for an interlocutory injunction and hence no necessity for a final hearing before three judges, although it may not have been erroneous for three judges to sit, a question we do not find it necessary to decide."

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NO. 99

In the Supreme Court of the United States

October Term, 1928

J. F. LAWRENCE ET AL.,
Appellants,

vs.

ST. LOUIS-SAN FRANCISCO
RAILWAY COMPANY,
Appellee.

STATEMENT AND BRIEF OF APPELLEE.

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INDEX

PAGE

Statement 1

Argument 10

Discussion of preliminary statements made by appellants in their brief:

The railway company is seeking relief against the State statute in question, but does all things required of it under the law 17

The act of the Legislature was never primarily designed to protect the health of employés and their families 20

The effect of the interlocutory injunction, and the question of jurisdiction 21

The trial court did not abuse its discretion in refusing jurisdiction 28

The effect of the order of the trial court refusing jurisdiction upon the attitude before the State Corporation Commission 40

I. The statute now under consideration is a reasonable law of domestic economy, in a district having local peculiarities, and interferes directly with no rule of commerce 49

II. The Oklahoma Statute now under consideration is constitutional and valid because it is an exercise of the police power, and this was apparent on the face of the statute 73

III. The Oklahoma statute is a denial of the guaranty of due and equal protection of the law under the

PAGE

Fourteenth Amendment to the Constitution of the United States. 77

IV. The next attack which we make upon this statute is that the Legislature selected an arbitrary point of time, and from that arbitrary point of time changed the rules of evidence, and by reason of such arbitrary point of time so selected, made and declared a *prima facie* case against removal by the railway company..... 85

CITATIONS OF AUTHORITIES.

Arkansas Railroad Commission *et al.* v. C. R. I. & P. Ry. Co., 274 U. S. 597, 71 L. ed. 1224..... 34

Bound v. South Carolina Ry. Co., 55 Fed. 186..... 38

C. B. & Q. Ry. Co. v. Ill., 200 U. S. 561, 50 L. ed. 596..... 74
C. O. S. 1921, Section 3482-3483-3484-3485..... 3-5
C. O. S. 1921, Section 3482-3484..... 29
Crutcher v. Commonwealth of Kentucky, 141 U. S. 47, 35 L. ed. 649..... 53

Druggan v. Anderson, 269 U. S. 36-40, 70 L. ed. 151-153, 46 Sup. Ct. Rep. 14..... 34

Ex parte Young, 207 U. S. 123, 52 L. ed. 714..... 17

Foster-Fountain Packing Co. *et al.* v. E. J. Haydel..... 57

Green v. Louisville Ry. Co., 244 U. S. 499, 61 L. ed. 1280.. 18
Gould v. McFall, 12 Atl. 336, 4 Am. St. Rep. 606..... 39
Gulf, Colorado & Santa Fe Ry. v. Ellis, 165 U. S. 150, 41 L. ed. 666..... 81
Goltra v. Weeks, 271 U. S. 536, 70 L. ed. 1074.....40-41

PAGE

Hannibal & St. Joseph Ry. Co. v. Husen, 95 U. S. 465, 24 L. ed. 527 52
Hawes v. Georgia, 258 U. S. 1, 66 L. ed. 431 87
Hovey v. McDonald, 109 U. S. 150-161, 27 L. ed. 888-891, 3 Sup. Ct. Rep. 136 36-37

Ill. Central R. Co. v. People of Ill., 163 U. S. 142, 41 L. ed. 107 63
Interstate Commerce Commission v. Louisville & N. R. Co., 101 Fed. 146 36-38

James-Dickson Farm Mortgage Co. *et al.* v. Harry 86
Johnson v. St. Paul & D. R. Co., 43 Minn. 222 82

Knox County v. George W. Harshman, 132 U. S. 14, 33 L. ed. 249 36-38-39

Lawrence v. St. Louis-San Francisco Ry. Co., 274 U. S. 588 11-16-33
Louisville Gas & Electric Co. v. Coleman 85
Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385 57-74
Lochner v. New York, 198 U. S. 45, 49 L. ed. 937 73

Merrimack River Savings Bank v. City of Clay Center *et al.*, 219 U. S. 527, 55 L. ed. 320 36
Michigan Public Utilities Commission *et al.* v. Duke, 266 U. S. 570, 69 L. ed. 445 56
Mississippi R. Commission v. Ill. Central R. Co., 203 U. S. 335, 51 L. ed. 209 60
Missouri, O. & G. Ry. Co. v. State, 53 Okla. 341, 156 Pac. 1155 93
McNeill v. Southern Ry. Co., 202 U. S. 542, 50 L. ed. 1142 54

People v. Mallan, 222 N. Y. 456, 119 N. E. 102 85

R. C. L., Vol. 6, Sections 227-228 71-72

Southern Ry. Co. v. King, 217 U. S. 524, 54 L. ed. 878 61
Soon Hing v. Crowley, 113 U. S. 703, 28 L. ed. 1145 78

PAGE

State of Iowa v. Garbroski, 111 Iowa 496, 56 L. R. A. 570 78
State v. Loomis, 115 Mo. 307..... 81
St. Louis-San Francisco Ry. Co. v. Public Service Commission of Missouri, 254 U. S. 535, 65 L. ed. 389..... 64
State *ex rel.* Holladay v. King, Sheriff, Indiana, 66 N. W. 82 38
State *ex rel.* Hogan *et al.* v. District Court of Thirteenth Judicial District, 25 Okla. 871, 108 Pac. 375..... 39
Society Anonyme Bu Filtre Chamberland Systeme Pasteur *et al* v. Blount, 51 Fed. 610..... 38
State v. Horton *et al.*, 97 N. W. 434..... 40
St. Louis, Iron Mountain & Sounthern Ry. Co. v. State, 31 Okla. 509, 122 Pac. 217..... 92

Texas & Pacific Ry. Co. v. Marshall, 136 U. S. 393, 34 L. ed. 385..... 88

Wharton v. Miller, 33 Okla. 771..... 92
Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355..... 54

NO. 99

In the Supreme Court of the United States

October Term, 1928

J. F. LAWRENCE ET AL.,
Appellants,

vs.

ST. LOUIS-SAN FRANCISCO
RAILWAY COMPANY,
Appellee.

STATEMENT AND BRIEF OF APPELLEE.

This is the same case that was before this Court as No. 894, October Term, 1926 (*Lawrence* v. *St. Louis-San Francisco Railway Co.*, 274 U. S. 588). The former appeal was from the order of a three-judge court, granting a temporary injunction. This appeal is from the final decree of the same court, after appellants' motion to dismiss appellee's complaint had been overruled, and appellants had refused to plead further.

Statement.

We think it necessary to enlarge somewhat on the statement contained in appellants' brief, pages 1 to 7. As

appellants refused to plead further after the lower court had overruled their motion to dismiss our original and supplemental complaints, there can be no dispute regarding the facts on which the judgment of the lower court is based. These facts are stated in our original complaint, as amended, and our supplement thereto, and, of course, are admitted to be true by appellants. Briefly stated, these facts are as follows:

More than thirty years ago, the St. Louis & San Francisco Railroad Company built and acquired lines of railroad extending from the cities of St. Louis and Kansas City, in the State of Missouri, to Afton, in the State of Oklahoma, at which point said lines of railroad united and extended in a single line in a southwesterly direction into the State of Oklahoma and the cities of Tulsa and Sapulpa, in said State; and thereafter there were built lines of railroad extending south from said city of Sapulpa, into the State of Texas, to the city of Sherman, in said State. Owing to the fact that at the time of the construction of said lines of railroad, the railway company received a large volume of its business from the vicinity of the city of Sapulpa, and owing to the further fact that it appeared to those having to do with the construction of said lines of railroad at said times that the city of Sapulpa would become the business shipping center of its locality, the railway company located, built and constructed at the said city of Sapulpa, certain railroad shops and a division point on said lines of rail-

road; and said shops and division point have been maintained and operated in the city of Sapulpa up to the time of the filing of this suit. On the 1st day of November, 1916, the St. Louis-San Francisco Railway Company became the owner, by purchase, of the above named lines of railroad and railroad shops, and has since owned and operated the same. During the month of February, 1917, appellants, J. F. Lawrence and C. C. Taylor, appearing on behalf of themselves and the Chamber of Commerce of the city of Sapulpa, and the citizens of said city, filed complaint with the Corporation Commission of the State of Oklahoma, for the purpose of preventing appellee from removing its said shops and division point from the city of Sapulpa to the city of Tulsa, on its line of railroad. Thereafter, on the 15th day of February, 1917, the Corporation Commission of the State of Oklahoma issued its order temporarily restraining appellee from moving its said shops, or division point, as aforesaid. A partial hearing was had on this complaint, and an adjournment taken. During that adjournment the Legislature of the State of Oklahoma passed the following Act, now found at Sections 3482, 3483, 3484 and 3485 of the Compiled Oklahoma Statutes 1921:

> "3482. That no person, receiver, firm, company or corporation owning, operating or managing any line of steam railroad in this State shall be allowed to remove railroad shops or division points which have been located at any place in this State for a period of not less

than five years without previously securing the permission of the Corporation Commission to make such removal.

"3483. If, and when any such person, receiver, firm, company or corporation desires to remove any such railroad shops or division point described in Section One of this Act, it shall be his duty to file an application with the Corporation Commission setting forth the present location of such shops or division point and the reasons for such removal, and thereupon the Corporation Commission shall have full power and jurisdiction to entertain such complaint, but before hearing the same or making any order permitting such removal to be made, said cause shall be set down for hearing, not less than ten days' notice shall be given the city, town or village in which or at which such shops or division point have been maintained and after giving all parties interested a full and complete hearing in the premises the Commission may in its discretion permit or refuse such request for a removal.

"3484. When an application is filed before the Commission for the removal of terminals or car shops, as provided in Section Two, the Commission shall hear evidence on the relative efficiency and expense of handling traffic through the proposed terminal as compared with the present facilities, and shall consider all other facts and circumstances affecting the various interests involved. In determining the adequacy of the present facilities the Commission shall consider the same increased by an expenditure equal to an amount necessary to remove the same to the proposed location or an amount equal to the necessary expenditure to establish such facilities at the new location. It is hereby further provided that the Commission shall hear evidence and shall make a finding of fact as to the sanitary and habitable conditions of the proposed location with reference to whether the same would endanger the health of the employes of the applicant or the health of their families. If the Commission should find

that the sanitary or habitable conditions at the proposed location of said terminal facilities would endanger or injuriously affect the health of the employes of said applicant or their families, the Commission shall deny said application and order the said terminal facilities and car shops to remain at the present location.

"3485. On any such hearing, as provided in this Act, the presumption shall be against the removal and the burden of proof rest upon the applicant to show that such removal ought to be made."

Thereafter, no further proceedings were had until just prior to the commencement of this suit.

Since the construction of appellee's lines of railroad, as above described, conditions have so changed as to make it imperative on the part of the operator of said lines of railroad to locate extensive shops and yards at the city of Tulsa, and at a point therein known as West Tulsa; and in order to facilitate both the intrastate and interstate commerce business of said railway company, it has become necessary to move its said division point from the city of Sapulpa to the said city of Tulsa. The city of Tulsa has developed into a city of approximately 125,000 inhabitants, and has become one of the largest shipping centers in the State of Oklahoma. Immense oil fields and oil properties have been developed and constructed, and are being operated in the vicinity of, and in all directions from the city of Tulsa, which has become the center of such operations. Other industries, transacting great volumes of business, have been located, and are now being located and operated

in said city, and in the vicinity thereof, and use said city as their shipping center. The city of Sapulpa has developed to only a very minor degree, the population at the time of the filing of this suit being not to exceed 20,000 people; and very few of the industries operated, as hereinbefore set forth, use Sapulpa, or the terminals there located, as a shipping center. The topography of the ground in the vicinity of the Sapulpa yards and shops will not permit the location and construction of sufficient facilities for the transacting of the shipping business necessary to be transacted at the shops and division point located in that vicinity. It has been, and will continue to be, impossible for appellee to construct at Sapulpa sufficient shops and yards to transact the necessary business. It is further shown that because of improved conditions of roadbed, bridges, etc., the increase of motive power and enlargement of engines and other equipment, it is now necessary to the proper conduct of business of said railway company, as an interstate carrier, to increase the distances between its division points and large shops; that the railway company is engaged extensively in interstate commerce, carrying a large volume of such commerce, both freight and passenger, from Kansas City, Missouri, and points north and east, to Tulsa, and other points within the State of Oklahoma, and to points south in the State of Texas, and from St. Louis, Missouri, and points north, east and south, to Tulsa and other points within the State of Oklahoma, and other States

to the south; that the facilities and equipment, constituting the shops and division point herein described, are necessary and imperative to the transaction of its said interstate business; that a removal of its shops and division point to Tulsa and a consolidation of said shops with the shops now located at Tulsa, will enable the railway company to promote and aid its interstate commerce business by eliminating annually hundreds of thousands of dollars of operating expense; that among many other items it will be able to save in wages of employes more than $200,000.00 per annum, and in operating material and equipment, in fuel, power and lights, approximately another $100,000.00 per annum; that owing to the fact that it has been necessary for said railway company to construct and maintain extensive shops and yards in Tulsa, in addition to the shops and yards at Sapulpa, if it is prevented from removing its said shops and yards from Sapulpa to Tulsa, it will be necessary to maintain and operate, at great expense and loss, two extensive sets of shops and yards, within eighteen miles of each other, thus entailing great additional and needless cost and expense, resulting in great confusion and congestion of traffic, causing loss of time to shipments, and interferring with, and placing a direct burden upon interstate commerce business; that in the proper conduct and operation of its railroad, it becomes necessary from time to time for the railway company to readjust its division points, and to find better and more efficient, suitable and convenient

places for repair work, and for keeping its rolling stock and other instrumentalities of its railway used in interstate commerce in proper condition; that these matters are purely managerial and necessary to be confided to such railway company, the better to serve the public and its stockholders and investors. (See appellant's complaint, R. pp. 1-17, and supplemental complaint, R. pp. 54 to 63.)

The bills further alleged—and of course it was admitted by appellants, so far as the questions now involved are concerned—that the part of West Tulsa to which the shops were to be moved, and the vicinity thereof, are sanitary, healthful and in every way suitable to the convenience, health and enjoyment of its employes (R. p. 61).

Anticipating that the railway company intended to remove its shops and division point from Sapulpa to Tulsa, the appellants, Lawrence and Taylor, appearing for themselves and the Chamber of Commerce of the city of Sapulpa, and citizens of said city, appeared before the Corporation Commission of the State of Oklahoma, on the 29th day of December, 1926, and procured the following order:

> "This cause coming on to be heard on this 29th day of December, 1926, upon motion of the complainants, and it appearing that the defendant is taking steps toward the removal of its shops and division point from the city of Sapulpa in violation of the order of this Commission, entered on the 5th day of February, 1917, and in violation of the Act of the Legislature passed in 1917, it is ordered by the Commission that said cause be set down for hearing on the 17th day of January,

1927, and that in the meantime, and until the further order of the Commission, the defendant be, and it is hereby prohibited from moving its shops or division point from the city of Sapulpa, from changing the runs of either its passenger trains, or from taking any other steps towards changing its division point for either passenger or freight service from the said city of Sapulpa" (R. p. 76).

A hearing was set by the Corporation Commission for the 17th day of January, 1927. On the 11th day of January, 1927, appellee filed its bill against appellants, charging that the statutes herein above set forth, insofar as they were sought to be made applicable to the conditions described by the undisputed facts herein, were unconstitutional, confiscatory, arbitrary, unnecessary and void; and that, as so applied, they granted to the Corporation Commission authority to issue orders and decide questions directly regulating, affecting and constituting a burden on interstate commerce; that said orders were therefore beyond the authority of the Corporation Commission, and, therefore, void; and praying that appellants be enjoined from compelling appellee to submit to the jurisdiction of the Corporation Commission in matters relative to said removal, in order that appellee might not suffer irreparable injury and damage that it otherwise would suffer if prevented from removing its shops and division point from Sapulpa to Tulsa. It was further alleged in said bill that said statutes were unconstitutional and void, and that said Commission was without power to act under said statutes.

in that they were not a proper exercise of the police power of the State, and deprived appellee of due process of law, and of equal protection under the law, as guaranteed by the Fourteenth Amendment to the Constitution of the United States; and that same were arbitrary, unreasonable and unnecessary, because neither the shipping public, the traveling public, nor the public at large had any interest in the place where railroad shops or division points should be located; that the location of railroad shops or division points did not serve to protect the public morals, public safety, or public health; and the right of the State of Oklahoma to enact such a statute could not be traced or referred to any legitimate or well-known source of police power; and that said statutes constituted an unconstitutional interference with the right of the railway company to manage its property and operate it for the best interest of the public and the stockholders of such company, and to operate the same economically, which, by law, it was required to do; that same were void because it affirmatively appeared from the contents of said statutes that they were enacted purely to serve local interests, and not to serve the public, and this regardless of whether they injuriously affected the property rights of the railway company and interfered directly with interstate commerce. The complaint further alleged that said statutes declared if division points or shops had been located at any particular place in the State of Oklahoma for a period of five years, the presumption against

the right of removal should obtain against the railway company, and that the burden of proof should be upon said railway company. Therefore, it was alleged that said statutes constituted an arbitrary exercise of police power; that the five-year period, as announced in said provisions, had no just relation to the proposition as to whether the right of removal existed; and that the change in the rules of evidence, by virtue of said five-year period, was unconstitutional, and deprived the appellee of its right without due process of law, and of equal protection of the law, as guaranteed by the Fourteenth Amendment to the Constitution of the United States (R. pp. 6-9).

Upon application of the appellee, a hearing was had, and a temporary injunction granted, as prayed for, by a three-judge court (R. p. 79). Appellants appealed from this order, and the lower court was reversed by this Court (*Lawrence* v. *St. Louis-San Francisco Railway Co.*, 274 U. S. 588).

During the appeal by appellants, last mentioned, the temporary restraining order made by the three-judge court, and appealed from by appellants, remained in full force and effect. This order had the effect of permitting appellee to remove its shops and division point. (*Lawrence* v. *St. Louis-San Francisco Railway Co.*, 274 U. S. 588.) Appellants were given an opportunity to supersede the judgment of the lower court during that appeal. This is shown af-

firmatively in the *per curiam* opinion of the three-judge court, filed on November 28, 1927, in which it is said, with reference to appellants' former appeal:

> "Defendants were afforded an opportunity to suspend the temporary injunction by executing a bond, which they declined to do" (R. p. 51).

and further:

> "Subsequent to the entering of the temporary injunction, and after counsel for defendant had announced that they would not suspend the order of the court pending appeal, plaintiff removed its division point and its shops to Red Fork (West Tulsa), now a part of the city of Tulsa" (R. p. 50).

The record further affirmatively shows that on the 24th day of January, 1927, appellants presented to the lower court their petition for appeal, which said petition was in regular form, and contained, among other things, the following representation:

> "Your petitioners further pray that the proper order touching security be made without superseding the decree referred to, and they tender bond in such sum as the court may require" (R. p. 55).

During the existence of this temporary restraining order made by the lower court, which appellants refused to supersede, and specifically stated that they would not supersede, the railway company moved its shops from Sapulpa to West Tulsa. In counsel's brief filed herein it is stated that this was hurriedly done. There is nothing in the record to show that any haste was used in such removal. The

order granting temporary restraining order was made on the 19th day of January, and was in full force and effect until May 31, 1927, during which time the division point and shops were moved.

On October 22, 1927, appellants presented their motion to the lower court, asking that the railway company be compelled to replace their shops at Sapulpa, and undo the things which appellants could have prevented its doing by superseding the judgment of the lower court during their appeal. This motion was refused by a *per curiam* opinion, set forth in full in the record herein (R. p. 44).

At the time of the hearing last mentioned, however, the trial court stated that the railway company, as a preliminary step to the further hearing of the case, should apply to the Oklahoma Corporation Commission to dissolve its restraining order, and to ratify the action of the road in moving the shops, and that the case would not be put to final hearing until this was done (R. p. 39). Acting in obedience to this direction from the court, the railway company made application to the Corporation Commission to dissolve its restraining order, which had theretofore been issued, restraining the railway company from moving its shops, and to ratify its actions in such removal, in which application the railway company set forth in detail, as it had set forth in its complaint filed herein, the reasons necessitating such removal.

This application was made by the railway company on November 5, 1927 (R. p. 58), and set for hearing by the Corporation Commission on December 5, 1927 (R. p. 59), at which time appellants appeared before the Corporation Commission and presented their objections, in writing, to the Commission's hearing the matter on its merits (R. p. 83). By these objections, appellants demanded that before we be accorded a hearing by the Corporation Commission, we do that which the Federal Court had already decided was unnecessary for us to do—that is, go to the enormous expense of removing the shops from Tulsa to Sapulpa; or that we state to the Corporation Commission that we would immediately comply with whatever order it might make regarding the removal of the shops; that we surrender any right we might have to supersede such order, on appeal, or to enjoin its enforcement in the Federal Court (R. p. 85). In said objections, appellants further represented to the Commission that we were in contempt of the Commission by reason of the fact that we were obeying the order of the trial court in permitting the shops to remain at Tulsa, and that we had not offered to purge ourselves of such contempt by offering to do that which the Federal Court had said was unnecessary for us to do (R. p. 85). At the conclusion of the hearing, the Commission held that our action in permitting the shops to remain at Tulsa, although we had been given that permission by the Federal Court, was in contempt of that body, and held, in effect, that, as a price

for a hearing of our application on its merits, we should forego the permission granted us by the Federal Court to retain our shops at Tulsa during the pendency of this suit, or pledge ourselves, in good faith, to abide by whatever order the Commission might make regarding the return of the shops, thereby foregoing our legal right to supersede such order if it was adverse to our interests, on appeal, or to enjoin its enforcement in the Federal Court in case the Corporation Commission should make an order which was arbitrary, unconstitutional or void (R. pp. 86-88).

Thereafter, and on the 12th day of January, 1928, the railway company filed a supplemental bill in this cause, in which its application to the Corporation Commission the objections of appellants to the Corporation Commission's hearing said application, and the order made by the Corporation Commission as a result of such objections were fully set out (R. p. 54).

On January 17, 1928, appellants filed in the United States District Court their motion to dismiss the bill and supplemental bill, for want of equity (R. p. 88). At the hearing of this motion, appellants announced that they intended to stand upon their motion to dismiss appellee's original and supplemental bills, and in the event same was overruled, they did not desire to plead further, but were willing that the cause be submitted upon said complaint, as amended, and appellee's supplemental complaint (R. p.

99). On March 12, 1928, after the cause had been submitted upon the allegations contained in appellee's original and supplemental complaints, the three-judge court overruled appellants' motion to dismiss, and entered judgment in favor of appellee (R. pp. 91-104).

ARGUMENT

As appears from the preliminary statement made by appellants in their brief, this cause has already been before this Court, and the opinion is found in *Lawrence* v. *St. Louis-San Francisco Railway Co.*, 274 U. S. 588. Both sides filed extensive briefs in the former appeal, and most of the questions now presented to the Court were presented then, but this Court did not decide them, because the reversal of the case was not based upon the substantial claim of appellee in its complaint, but largely upon the improvident action of the trial court, under all the circumstances, in granting an interlocutory or preliminary injunction.

Before we proceed to a discussion of the main propositions in this cause, we desire to consider and discuss some of the preliminary statements made by appellants in their brief. For the purpose of our discussion, the statements contained in appellants' brief will be grouped under the following propositions:

The railway company in seeking relief against the state statute in question, has done all things required of it under the law.

The contention of appellants is now, and has been, that before the appellee could enter a court of the United States to attack the state statute in controversy here, it must exhaust its remedies before the state tribunals, and they argue as a corollary from such statement that this action was premature; that the Corporation Commission has never passed upon the right of the appellee to move its shops and division point from Sapulpa; that this is necessary before the Federal Court in this case could, or can, exercise jurisdiction.

We stated, as we stated before in the hearing of this case, that whenever a state statute is, on its face, obnoxious to any provision of the Constitution of the United States, any person or corporation, against whom or which such statute is attempted to be enforced by state officers, whether acting as the State Commission, or otherwise, may, in the first instance, without waiting for the enforcement of the statute, apply to the appropriate Federal tribunal for relief against such state.

The case of *Ex parte Young*, found in 209 U. S. at page 123, 52 L. ed. 714, sustains this proposition, and for years and years the doctrine of this case has been recognized and approved by later decisions of this Court. The opinion in the case is an exhaustive one and seems to have considered every phase of the controversy. And in the last

analysis that case declares that any attempt of state authorities to enforce a statute, unconstitutional on its face, when measured by the provisions of the Federal Constitution, may be met by application to the appropriate Federal Court to arrest any action by the state authorities under such statute.

In this connection we beg to say that there is a vast difference between state authorities moving to execute a state statute, unconstitutional on its face, and the movement of a state commission, or body, toward the creation of some condition, or the making of some order, which may prove to be unconstitutional. So that in the case of the statute unconstitutional on its face, it is perfectly proper to attack such statute, in the first instance, in the Federal Court; when in the other case it might be proper and necessary to await the final action of state authorities before the order or condition created is open to attack in the Federal Court.

Mr. Justice Pitney, who rendered the opinion in the case of *Greene* v. *Louisville Railway Co.*, 244 U. S. 499, 61 L. Ed. 1280, in commenting upon the Young decision, on page 506, said:

> "Individuals who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an uncon-

stitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action.

"In repeated decisions since *Ex parte Young*, that case has been recognized as setting these questions at rest."

Answering, therefore, the contention of appellants in their brief that this action was premature, we refer as a general proposition to the long line of cases cited by the Court since the Young case, and contend that the appellee was well within its rights when it applied, in the first instance, to the Federal Court to stop the enforcement of a statute which is charged and believed to be invalid when measured by the Federal Constitution.

We believe, however, that the appellants have estopped themselves from asserting that this action was premature, This case went on appeal to this Court, and this Court reversed the case, and in the opinion granting such reversal this Court said to the lower Federal Court to retain jurisdiction of this case until final hearing, but suggested that as a matter of comity and courtesy it might be well to pass the matter of removal up to the Corporation Commission of the State of Oklahoma and await the action of that Commission. This Court in that connection said:

"The railway would not thereby have waived its right to contest in the Federal Court the validity of the Oklahoma law."

In other words, we understand the Court to say and

to mean in that decision that the Federal Court should delay further action in the matter before it until the Corporation Commission had an opportunity to pass on the removal question upon application to be made to it by the appellee. That application was made as directed, seasonably and in good faith. When the application before the Corporation Commission was taken up, counsel for the appellants prayed the court not to hear the application until the shops and division point which had been removed should be restored to Sapulpa, or until the appellee making the application to the Corporation Commission should agree to abide by whatever order the Commission might make with reference thereto. Judge Van Valkenburg of the three-judge court, takes up this question in his opinion on page 101 of the transcript, and he there says:

> "There is nothing in this opinion (meaning the Supreme Court opinion) which can be construed as a command that the matter must be referred to the Corporation Commission as a condition precedent to final hearing. But in order that the rule announced by the Supreme Court should be observed in spirit, as well as in letter, and that full deference should be accorded to the demands of comity and courtesy, we exacted application to the Commission before we would enter upon a final hearing of the case. The Commission has declined to hear the application until the performance of a condition which it is without power or authority to enforce. The denial by this court of present restoration was not made out of disrespect for the Commission nor in disregard of its legitimate authority in the premises. It was made in the exercise of what we deemed to be a sound discretion, under the circum-

stances now existing, for the prevention of what might be unnecessary expenditure, and pursuant to a jurisdiction which had attached, which was expressly retained, and of which this court could not be collaterally deprived. By making its application in good faith, and the refusal of the Commission to entertain that application, complainant has exhausted its remedy before that tribunal in a legal sense. Since this result was brought about at the instance and demand of respondents, they can no longer be heard to insist upon a decision which they opposed and prevented."

We say, therefore, that the question in this case as to whether the appellee could go before the Federal Court without first going to the Corporation Commission, has been eliminated, because following the insistence of appellants that the matter must first be heard before the Corporation Commission, the lower Federal Court ordered appellee to go there in order to satisfy that insistence of appellants. The appellee prepared its application in due form, but was denied entrance into the Commission because it would not agree to a condition which was arbitrary, unjust and unreasonable; which was in defiance of an order made by the United States Court, and obedience to which would have destroyed and nullified every order or action by the United States Court in this cause, and would have collaterally deprived that Court of jurisdiction when the appellants knew that this Court, in its former opinion, had not only recognized the jurisdiction of the lower Federal Court, but had ordered that Court to retain jurisdiction until final hearing.

The appellants, therefore, had an opportunity to contest this matter of removal before the Corporation Commission before a final hearing in this case in the Federal Court, but declined that contest by the imposition of unreasonable and impossible conditions. We say, therefore, that it does not lie in the mouths of these appellants to claim that this action is premature, and that we ought to have exhausted our remedies before the state tribunals before entering the Federal Court for relief. The appellants insisting that the Corporation Commission must first hear this case, were granted that insistence, and yet when the appellee went before the Corporation Commission to try out, in good faith, the merits of its application, it was denied entrance into the Commission and denied a hearing at the prayer of these appellants. Under this state of affairs there was nothing left to the appellee except to return to the Federal Court retaining jurisdiction, report to that Court that the Commission had refused to hear its application for removal, and ask for final judgment.

We conclude, therefore, that the position of the appellants that the action in this case was premature; that the appellee ought to have gone before the Corporation Commission to raise the constitutionality of the law, and have permitted that Commission to go to final judgment in the cause before applying to the Federal Court, is untenable and unsound. The opinion of the three judges on the motion to dismiss the complaint, found on page 91 of the

transcript of the record, in construing the opinion of this Court in the former appeal, said on page 100 of the transcript:

> "The jurisdiction of this court to proceed to final hearing was recognized."

Again quoted from the opinion of this Court:

> "No right or interest of the railway would have been prejudiced by participating in the hearing before the Commission and awaiting the result thereof. The railway would not thereby have waived its right to contest in the Federal Court the validity of the Oklahoma law."

And again quoted from the former opinion of this Court:

> "The effect of the Commission's restraining order was merely to keep things in *statu quo* until the final hearing in Federal Court."

We now proceed to notice the second proposition of the appellants in their brief, in which they say that the application made by the railway company to the Corporation Commission did not comply with its duty or with the requirements of the statute.

An examination of this contention by the appellants necessitates a brief statement of facts which are more fully set out and elaborated in the statement in this brief.

The lower Federal Court granted an injunction against the Corporation Commission from enforcing the state statute now in controversy. The case was appealed to this

Court and reversed on the ground that the preliminary injunction ought not to have been granted. No supersedeas bond was given by appellants to prevent the execution of the judgment of the Federal Court. Indeed, the attorneys for appellants stated, in open court, that they did not desire to supersede the judgment, but simply gave a cost bond. The railway company was compelled by the Federal Trial Court to execute a bond in the sum of fifty-thousand-dollars to answer for all damages that might result from the improvident and erroneous issuance of the temporary injunction. Under this state of facts, there being no supersedeas bond, and a fifty-thousand-dollar bond required of the railway company to answer for damages, the company moved its shops and main terminal to the City of Tulsa. The right of the railway company to remove under such conditions will be discussed under a separate proposition in this brief.

While the judgment of the lower Federal Court granting a temporary injunction was reversed by this Court, the lower Federal Court was ordered to retain jurisdiction of the cause so that it might go to final hearing when the proper time arrived.

In due course of time, appellants, through their attorneys, appeared before the lower Federal Court, showed that the shops and terminal had been removed from Sapulpa to Tulsa, and asked and prayed that Court to order

restitution and compel the railway company, at once, to take its shops and terminal back to Sapulpa, by reason of the fact that the order granting the temporary injunction had been reversed and set aside, and that it was the duty of the Federal Trial Court to undo what it had already done. The Federal Trial Court heard such application for restitution and denied the same and the reasons therefor are stated on pages Nos. 56 and 57 of the transcript in this cause. Attorneys for appellants alleged in their application for restitution that the Corporation Commission had no power to order restitution, and that the Federal Court was the only court that could order restitution. The lower Federal Court, after denying restitution, made an order on appellee, found on pages Nos. 43 and 44 of the transcript that before the Federal Court would take any further steps looking to a final hearing, appellees should make application to the Corporation Commission to dissolve its restraining order heretofore made, restraining the appellee from removing its shops and division point from the City of Sapulpa to the City of Tulsa, and asking the Commission to ratify the action of said railway company in removing its said shops and division point during the pendency of the cause, and the trial court, in obedience to the opinion of this Court on the former appeal, in said order retained jurisdiction of the cause so that it might later go to a final hearing. The appellee, with due dispatch, carried out the order of the Federal Court and made application to the

Corporation Commission as shown by the statement in this brief, asking that it be heard; that the injunctive order heretofore issued against the railway company be dissolved, and that the removal of its shops and division point heretofore made to Tulsa, be approved.

Appellants, through their attorneys, advised the Commission not to hear the application of appellee unless appellee either immediately restored its shops and terminal, or agreed to do so, if the Commission should hold against the removal, and that if the railway company should not accede to this demand on the part of the Commission, it would be in contempt, and the Commission would refuse to hear the case, which it did refuse to do.

The gravamen of the appellants' complaint to the Commission was that unless the railway company restored its shops and terminal before the hearing before the Commission was commenced, or agreed to do so on the judgment of the Commission, the railway company would be in contempt of the Commission, and the appellants cite a long line of cases in their brief to the effect that a party in contempt cannot be heard to apply for affirmative relief which, in any way, recognizes and ratifies its contempt. In the main we have no quarrel with the authorities cited. It appears that in each of these cases the party held to be in contempt had, on its own initiative, disobeyed some order of the court without any excuse or justification for

the disobedience of said order; but the situation here is entirely different. Appellee went before the Corporation Commission under specific and compulsive direction of the Federal Trial Court. It did exactly what the Federal Court having jurisdiction of this cause told it to do. We followed the direction of the Federal Court both in spirit and letter, and when the matter was presented to the Corporation Commission, it declared the appellee in contempt, although the appellee was doing the very thing the Federal Court ordered it to do. So, in the last analysis, the Corporation Commission is holding appellee in contempt for doing the thing which the Federal Court having jurisdiction of the cause, ordered it to do. We cannot understand how the Corporation Commission can exercise such an arbitrary and extraordinary power against this railway company, and, by its order refusing us hearing, absolutely nullify all the orders of the Federal Court sending us to that tribunal in order to obtain a hearing. Therefore, it seems to us to be clear that this is not a case where a litigant is asking affirmative relief when it is in open contempt of the tribunal from which it asks such relief; but is a case where the litigant is not only not in contempt, but is acting upon a valid order of a court of the United States having jurisdiction to make such order.

We think the action of the Corporation Commission in refusing to hear the application of the railway com-

pany for a hearing on these things involved in this case, was arbitrary, unreasonable and unjust, and it seems to us that the appellants are estopped from saying that appellee did not comply with its duty, or with the requirments of the Oklahoma Statute.

If the appellee had not attacked and was not attacking the constitutionality of the statute in question, and had gone before the Corporation Commission with an application to remove its shops and division point while an injunction of the Corporation Commission was still outstanding, preventing appellees from a removal, and the Corporation Commission had refused such hearing until certain extraordinary conditions were complied with, the Corporation Commission would certainly be depriving the appellee of due process of law, because appellee would have been in a position where the injunction held it from removing its shops, and yet where it could not get a hearing for that purpose, which certainly would not be due process of law. We can see little difference between this suggested case and the instant case. We were denied a hearing unless we complied with ridiculous and impossible conditions. What remedy was left to this appellee except to go to the Federal Court retaining jurisdiction of this cause, and ask for final judgment? This Court, in its opinion in this case on former appeal, said that if the facts in the case showed removal would result in improved service and in economy of operation, the Commission ought to authorize

removal. These facts appeared undisputed before the Federal Trial Court on the final hearing of this case, and, in our opinion, it could do nothing except render judgment for the appellee.

The act of the Legislature was never primarily designed to protect the health of employes and their families.

Nobody denies the power of a State Legislature to enact laws for the health and safety of railroad employes. The very essence of the police power of a State or sovereignty consists in the ability and power of the State or sovereign to enact laws for the health, safety and morals of its people. But, it is also true that no State in this Union under the guise of police power, can enact a statute which is arbitrary and unnecessary, or which offends against any provision of the Federal Constitution. The weakness of the argument of appellants to sustain the point above quoted, it seems to us, is clearly apparent.

The statute under consideration consists of two separate and distinct branches:

Section 3482 of the statutes, provides that railroad shops and division points which have been located for as much as five years at a particular place, shall not be moved without the permission of the Corporation Commission.

Section 3484 of the statutes, provides that if the Commission grants the application under Section 3482 to remove, it may further consider the point to which the rail-

way company proposes to remove, and it may determine whether such point will endanger the health of employes, or their families.

This is not a statute which provides that at any time a railway company removes its division point or shops, it shall remove them to a sanitary and habitable place. Such statute, standing alone, might be claimed as a health statute, and therefore valid. But the point of attack which we are making upon this statute, is as to the power and right of the Legislature to confer upon the Commission the authority to say when the railway company shall move its railway shops and division point. From a reading of the statute it will be seen that the sanitary provision has no relation to the question as to whether a removal at all shall be had, but has relation only to the point to which removal is made, after the Commission has sustained the right to remove.

In other words the first thing to be determined by the Commission is whether the railway company shall move its division point and shops. It is as to the right of the Commission to determine that question of removal that we make our attack. On the face of the statute it is clear that the right, in the first instance, to remove is not to be determined, according to the very language of the statute, by a question of health, a question of morals, or a question of safety or public welfare, but it is only after the right to

remove has been granted that the sanitary clause of the statute is considered at all. Therefore, it seems to us unreasonable and untenable to say a sanitary or health provision, which relates only to the place to which the removal shall go, saves the whole statute as founded upon a police regulation for the public health. The question as to whether the railway company can remove at all, cannot involve the health of the employes of the community, and it is as against the power of the Corporation Commission to determine in the first place whether the railway company shall remove at all, that we center our attack.

We, therefore, respectfully contend that the Legislature could not say that one separate and independent section of a statute which is claimed to be unconstitutional, can be saved by a further provision in the same statute as to sanitary conditions. We, therefore, say this statute was not primarily designed to protect the health of railroad employes and their families; that the sanitary provision of the statute, with reference to a proposed location after change, does not save a prior provision which, in its very essence, we claim is unconstitutional.

The effect of the interlocutory injunction, and the question of restitution.

Counsel's ninth, tenth and eleventh propositions, shown at pages 43, 46 and 54, respectively, of their printed brief, are as follows:

"Ninth.

"It was the duty of the district court to require the railway company to return its shops and division point to Sapulpa.

"Tenth.

"It is well settled that on reversal of a judgment restitution will be ordered.

"Eleventh.

"Our motion to require the railway company to restore the status quo should have been heard by the district judge, and it was error for the three judges to sit."

These propositions will be considered together. On page 43 of their brief, counsel say, with reference to the return of the shops to Sapulpa:

> "The point is, of course, immaterial in the event of an affirmance, but if there is a reversal it becomes important."

With regard to the number of judges sitting at the hearing of appellants' motion to restore the *status quo*, counsel say, at page 54 of their printed brief:

> "This point, in all probability, will not arise in this Court. If this Court should reverse the lower court, and direct restitution to be made, the lower court will, of course, make it whether the district judge sits alone, or whether the three judges sit."

From the above it is seen that counsel concede neither of these three propositions is material or important to this this Court, in its consideration of the main questions in-

volved in this appeal. With this contention we agree. If this Court should hold that the lower court was right in rendering judgment in favor of the appellee, on the undisputed facts in this case, then the effect of the decision will be, of course, that the railway company had the right to remove its shops, and that such removal was at no time wrongful. Of course, if this Court should reverse the holding of the lower court, in its final decree, and hold that the statutes attacked in this suit are valid, and that the railroad company in no event should have removed its shops until it made application to the Corporation Commission, and until it had received an affirmative permission from that Commission, then a different proposition would be presented.

The above being true, we think the questions as to whether or not three judges should have sat at the hearing of appellants' motion to restore the *status quo*, and the correctness of the trial court's holding that it should not compel the removal of the shops to Sapulpa during the pendency of this suit have become moot insofar as this appeal is concerned, except only insofar as the last named decision affected our status before the Corporation Commission, in our application for its approval of our actions in moving our shops during the existence of the district court's interlocutory injunction, vacated by this Court in its decision in *Lawrence* v. *St. Louis-San Francisco Railway Co.*, 274 U. S. 588.

As shown in the statement at the beginning of this brief, the shops and division point were moved by us during the time the interlocutory injunction of the trial court—which this Court has held had the effect of setting us free to move—was in full force and effect. The mere fact that this Court has held said order was improvidently issued does not affect its validity and permissive force during the time of its existence. In the opinion of this Court, rendered herein, this Court said:

> "Although proper practice demands that the provision thus prescribed by Congress be scrupulously observed, disregard of the statutory requirement concerning the form of the order would not render the interlocutory decree void. *Druggan* v. *Anderson*, 269 U. S. 36, 40, 70 L. ed. 151, 153, 46 Sup. Ct. Rep. 14."

In *Druggan* v. *Anderson, supra,* cited by this Court in the above excerpt, petitioner was being prosecuted for contempt in disobeying the provisions of a temporary injunction, and took the position that the injunction order was void for want of notice required by Equity Rule 73, and the Act of October 15, 1914, page 323, Section 17, 38 Stat. at L. 730-737, C. O. S. Sec. 1243, 6 Fed. Stat. Ann. 2d ed., page 139. In regard to such contention, this Court said:

> "But if notice were required, the injunction could not be disregarded as void."

Also, in *Arkansas Railroad Commission et al.* v. *C., R. I. & P. Ry. Co., 274 U. S. 597, 71 L. ed. 1224,* decided by

this Court at the same term as *Lawrence* v. *St. Louis-San Francisco Railway Co., supra*, this Court said:

> "Disregard by the District Court of the United States, in granting an interlocutory injunction, of the provisions of U. S. Code that every order for an injunction shall set forth the reasons for the issuance of the same does not render the order void."

Thus, it is seen that the interlocutory injunction was effective from the time it was issued until vacated by this Court, and as it was not superseded, the railway company was privileged to act in accordance with its permissive effect.

As we understand the matter, there are two methods of appeal, one with supersedeas, and the other without. If a judgment of a lower court is not superseded, it has all the effects of a final judgment until vacated. Counsel, in their brief, say, however, that the members of the Corporation Commission, and the Attorney General of the State of Oklahoma, and two private citizens of Sapulpa would not be expected to subject themselves to a possible great personal liability in order to supersede this judgment. We submit that the attitude of the appellants at the time this judgment was rendered could in no manner affect its force and validity. However, it was within the power of the trial court, and this Court, had proper application been made by appellants, to supersede the interlocutory order in any manner consistent with the rights and equities of all parties concerned. If appellants had

made the proper application to the trial court, or to this Court, and either of these courts had concluded that, as appellants appeared in representative capacities, they should not subject themselves to personal liability, then proper orders could have been made superseding the interlocutory order, without any of the dangers mentioned by counsel. *Merrimack River Savings Bank* v. *City of Clay Center et al.*, 219 U. S. 527, 55 L. ed. 320; *Hovey* v. *McDonald*, 109 U. S. 150, 161, 27 L. ed. 888, 891, 3 Sup. Ct. Rep. 136; *Knox County* v. *Geo. W. Harshman*, 132 U. S. 14, 33 L. ed. 249; *Interstate Commerce Commission* v. *Louisville & N. R. Co.* 101 Fed. 146.

In *Hovey* v. *McDonald, supra*, this Court said:

> "In recognition of this power, and for the purpose of facilitating its proper exercise in certain cases, on appeals from the circuit courts, this Court, by an additional rule of practice in equity, adopted in October term, 1878, declared that 'when an appeal from a final decree in an equity suit, granting or dissolving an injunction, is allowed by a justice or judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending or modifying the injunction during the pendency of the appeal upon such terms as to bond or otherwise as he may consider proper for the security of the rights of the opposite party.' "

In this case, appellants were given every opportunity to supersede the interlocutory order. In the *per curiam* opinion of the Court, denying appellants' motion for restitution during the pendency of this case, the three-judge court said:

"Defendants were afforded an opportunity to suspend the temporary injunction by executing a bond, which they declined to do" (R. 51).

The Court, in the same opinion, said further:

"Subsequent to the entering of the temporary injunction, and after counsel for defendant had announced that they would not suspend the order of the court, pending appeal, plaintiff moved its division point and its shops to Red Fork (West Tulsa), now a part of the city of Tulsa" (R. 50).

An excerpt from appellants' petition for appeal from the interlocutory injunction order is contained in the record of this appeal, and is shown at page 55 thereof, as follows:

"Your petitioners further pray that the proper order touching security be made without superseding the decree referred to, and they tender bond in such sum as the court may require."

It was very obvious that the primary purpose which prompted appellee to secure the injunction order was to permit it to do the things which it alleged the citizens of Sapulpa and the State officials were preventing it from doing; that is, to move its shops and division point from Sapulpa to Tulsa. We do not believe that appellants can consistently plead surprise when the very thing was done which appellee was attempting to get permission to do. The record in this case shows that at the time of the filing of our original bill, District Judge Franklin E. Kennamer granted a temporary restraining order, which, by its terms, was effective until the hearing on our application for an

injunction. This order restrained appellants from taking any action, having for its purpose the prevention of the removal of the railroad shops, or the changing of the runs of the railway company's trains, and also contains this provision:

> "It is further ordered that the plaintiff in this case take no action toward removing its shops, division point, or changing the runs of its trains, until further order of this Court" (R. 78).

At the hearing on our application for injunction, a temporary injunction was issued, which contained no provision restraining the railway company from moving its shops. The bond on the part of the railway company was fixed at $50,000.00. The change in these orders, and the increase in the bond was clearly made with the idea on the part of everyone connected with the case that the railway company would be free to act unless the interlocutory injunction was superseded. The bond was fixed at the sum of $50,000.00 for the evident purpose of securing appellants in the collection of any damages which they might incur if they did not supersede the order, and the railway company moved its shops.

Of course it will not be contended that the appeal had the effect of superseding the interlocutory injunction order. *Knox County* v. *Harshman*, 132 U. S. 14, 33 L. ed. 249; *State ex rel. Holladay* v. *King, Sheriff, Indiana*, 66 N. W. 82; *Bound* v. *S. Carolina Ry. Co.*, 55 Fed. 186;

Society Anonyme Bu Filtre Chamberland Systeme Pasture et al. v. *Blount*, 51 Fed. 610; *Interstate Commerce Com.* v. *Louisville & N. Ry. Co.*, 101 Fed. 146; *State ex rel. Hogan et al.* v. *District Court of Thirteenth Judicial District*, 25 Okla. 871, 108 Pac. 375. In *Knox County* v. *Harshman, supra*, this Court said:

> "The general rule is well settled that an appeal from a decree granting, refusing or dissolving an injunction does not disturb its operative affect."

The trial court did not abuse its discretion in refusing restitution.

As already stated, we think this question is material at this time only as it affected our status before the Oklahoma Corporation Commission. When this case was returned to the trial court from the former appeal, the interlocutory injunction order had been vacated by this Court. Owing to the fact that that order had not been superseded during appeal, the shops had been moved from Sapulpa to Tulsa, at a considerable expense on the part of the appellee. A $50,000.00 bond had been given to secure appellants against loss by reason of such removal. This Court had held, in effect, that the district court should retain jurisdiction, but had intimated that before final hearing, application should be made, on the part of the railway company, to the Corporation Commission. With matters in this condition, appellants filed a motion to require the railway com-

pany to go to the enormous expense of returning its shops to Sapulpa before any further steps were taken, either by the trial court or the Corporation Commission. They conceded in their motion that the Corporation Commission had no authority to require the shops to be removed to Sapulpa, but addressed the sound discretion of the trial court in this regard. They then relied, and now rely upon many cases to the effect that after final judgment, restitution should be ordered. The trial court, after considering the argument and authorities presented by both sides, said:

> "We are of the opinion that nothing can be accomplished, considering and balancing the conveniences in the case, by requiring plaintiff to remove the shops to Sapulpa pending a final determination of the case. The shops were moved at great expense to the plaintiff, and further expense will be incurred if the shops are restored. Defendants could have prevented the removal by executing a bond, which they declined to do, and as the issues now presented are so doubtful, this Court, in the exercise of a sound discretion, should deny restitution. In so ruling, the comparative advantages and disadvantages involved, the conveniences and inconveniences of the parties hereto, as well as the interests of the shipping public generally, have been considered. We think an order of restitution should not be made, if at all, until after final hearing, when the other rights of the parties are established" (R. 52).

In so holding, the trial court followed *Goltra* v. *Weeks*, 271 U. S. 536, 70 L. ed. 1074; *State* v. *Horton et al.*, 97 N. W. 434; *Gould* v. *McFall*, 12 Atl. 336, 4 Am. St. Rep. 606.

At the time the trial court rendered the *per curiam*

decision last mentioned, it had heard practically all the arguments in the case, and was evidently of the opinion that appellee (plaintiff below) should recover provided, of course, an additional showing was not made to the contrary. Being of that opinion, would it not have been an idle form to cause the railway company to go to the enormous expense of removing its shops to Sapulpa, and then, in the event that it recovered, to move them again from Sapulpa to Tulsa? In *Goltra* v. *Weeks, supra,* this Court said:

> "At the hearing it was made plain that Goltra was not entitled to the possession, and the court—one of equity—did not go through the idle form of restoring the property to Goltra by way of correcting the Colonel's wrong, and then requiring a re-delivery to the lessor.
>
> "As it is, the Court has taken over the fleet and given it to Goltra under bond, and the only issue that remains is whether the injunction and the restoration should be maintained, or the injunction be dissolved and the fleet returned to the lessor.
>
> "On an appeal from a temporary injunction it often happens that where there is a balance of convenience and doubt as to the issue, the *status quo* under the restraining order and the restoration should be maintained until a final hearing; but in this case in the court hearing it, the issue was fully treated as if on final hearing."

We think the trial court was fully justified, owing to the condition of this case at the time of the return of the mandate of this Court, in deciding that, from the comparative advantages and disadvantages involved, the conven-

iences and inconveniences involved, as well as the interests of the public, the railway company should not be compelled, during the pendency of this trial, to move its shops from Tulsa to Sapulpa.

The effect of the order of the trial court refusing restitution upon our attitude before the State Corporation Commission.

It is conceded by counsel for appellants that the question of restitution was one within the jurisdiction of the trial court. A full hearing was had upon this subject, and restitution during the pendency of this suit was refused. The effect of the order of the trial court in refusing restitution was to hold matters in *status quo* until the termination of this suit. With matters in this condition, the trial court directed that, as a preliminary step to the further hearing of this case, we make application to the Corporation Commission for the revocation of its restraining order, and ratification of our action in moving. This, we did, presenting to the Corporation Commission, the matter as fully as we had presented it to the trial court (R. 63-75), but there we were met with the demand on the part of appellants that we do what the trial court said was unnecessary to do during the pendency of this case—that is, remove our shops from Tulsa to Sapulpa—or that we treat whatever order the Corporation Commission might make as final, and immediately remove our shops from Tulsa to Sapulpa in case the Corporation Commission so directed.

The position of appellants before the trial court, and before this Court on the former appeal, was that we should have made application to the Corporation Commission before asking affirmative relief from the Federal Court. This Court held, in its former opinion, that the Federal Court could retain jurisdiction of the case, and application could still be made to the Corporation Commission before final judgment. The trial court directed that this be done. This was, in substance, at least, a compliance with appellants' demands; but when we went before the Corporation Commission, and under the direction of the trial court, in good faith, submitted all our case to that Commission, appellants objected to such a hearing, but succeeded in getting the Corporation Commission to hold that in obeying the direction of the trial court we were in contempt of the Corporation Commission, and that such Commission would refuse us even a hearing until we did that which the Federal Court had already adjudged we were not compelled to do until the final hearing of this case.

One of two courses was open to us: First, we could go to the enormous expense of removing our shops to Sapulpa, before the final hearing of this case—a thing that had already been adjudicated in our favor by the Federal Court. Second, we could go back to the Federal Court with a supplemental bill, detailing our acts before the Corporation Commission, and ask relief, as a matter of equity, without being compelled to do that which the court had

adjudged we were not compelled to do before obtaining such relief. Naturally, we selected the latter course.

If the trial court had jurisdiction to decide the question as to whether or not we should restore our shops during the pendency of this action, then we certainly had a right to act and rely upon that decision; and in such case, the Oklahoma Corporation Commission had no right to deprive us of the right that the Federal Court had given us, as the price of a hearing before that body.

We have noticed these several points raised in appellants' brief in the order which they have been presented in the brief. We shall now proceed to state the points upon which we rely, as affecting the constitutionality of the statute in question.

I.

The statute now under consideration is a regulation of interstate commerce, is a direct burden upon interstate commerce, and interferes directly with interstate commerce.

We contend that the statute which we are attacking in this cause is, on its face, a regulation of interstate commerce; that in its necessary operation it will seriously interfere with interstate commerce; that if sustained, it amounts to State operation of the railway's business, and that, therefore, this State statute is in the "teeth" of the

commerce clause of the Constitution. It would be almost an affront to this Court to take its time to discuss the origin of this commerce clause of the Constitution, its necessity and the salutary effect it has had in the protection of property and business within the confines of the American Union. We do know that, in its very essence and purpose, it is a limitation upon the police power of the States. It was intended to make commerce between the States and foreign nations free and untrammeled, subject only to the controlling and regulating power of the National Government. It is not denied by us, and it cannot be denied, that under many decisions of this Court police regulations of a State, with reference to interstate railroads, have been sustained and will be sustained, and this is so even though Congress has passed no legislation with reference to the subject matter, but the rule is, and has always been, that the State statute in question must be necessary; that it must serve some public purpose within the reach of the State through its police power, and that under the guise of police power the State can never be permitted to regulate, in the least degree, interstate commerce or to place a direct burden upon the same. It is obvious, therefore, that every State statute under consideration by this Court, as to whether it was a valid exercise of the police power of the State, considering its operation and effect as against the commerce clause of the Constitution, will depend not only upon the language of the

law, but the subject-matter covered by the law, and the relation of that subject-matter to interstate commerce.

This Oklahoma Statute confers the power upon the Corporation Commission of the State to determine whether a railway company, largely interstate in its character, and doing largely interstate business between many States, shall change its division points from one place to another on its line, or its shops from one place to another on its line. It becomes necessary, therefore, to consider the subject-matter of this legislation and its relation to interstate commerce as such. It is pertinent, therefore, to inquire what division points are; what they mean to an interstate railroad, and what part their locations play in the movement of interstate commerce and in the successful conduct of the railway's business in the interest of the public and of the stockholders of the road.

In our complaint filed in the Federal Court in this case, we set up that this statute fetters and interferes with interstate commerce of the Frisco Railroad; that it is, in effect, a regulation of said commerce, and a direct interference with such commerce, and we took affidavits from various officials and employes of the road to ascertain just what division points are; what is their purpose and meaning, and what part they necessarily play in the interstate business of a railroad. It was established, and not denied by appellants at the hearing before the three judges, that the creation of division points along the line of an inter-

state railroad was primarily for the purpose of increasing the facilities for handling interstate and intrastate commerce; that division points are established at one place or the other, according to the necessity of traffic, and for the purpose of facilitating that traffic; that a division point established one year may not be the proper division point the following year; that, in early days, division points were more numerous and closer together by reason of the inferiority of the motive power and tracks, but in modern days, by reason of improved trackage and improved motive power, division points are constantly lengthened, and an effort is made wherever possible, in the interest of economy, to abandon as many division points as practical; that division points are never made for the convenience, of either the passenger or the shipper, but for the purpose of facilitating the commerce coming to the railroad; that the shipping public is constantly demanding better service and more dispatch in the movement of freight, and that the traveling public is demanding faster trains and fewer stops in order that they may reach the busy centers on interstate railroads, and that in order to satisfy this growing demand of the traveling and shipping public, great competition has arisen between railroads, and, therefore, it is necessary for any particular railroad to meet these demands in order to hold its business. It was also shown that if a division point is no longer pratical from a standpoint of business or economy, or from a standpoint of quick

service, great confusion will result in the management of trains; great delays will occur in the movement of freight and passengers if the company is not permitted to select the points at which it will establish divisions, or is not permitted to leave a point where a division has been established, and it was also shown that a large percentage of all cars moving on this railway company's line are interstate commerce; that the shops are a necessary incident to interstate commerce in order to keep the equipment in proper condition to move the cars, and in the natural course of things must, in nearly every case, be located at division points; that neither the traveling public nor the shipping public, nor those who have business with the railroad, are affected one way or the other either by the location of division points or the location of repair shops; that the public convenience is in no way served by such locations, but they are located primarily and purposely as necessary instrumentalities in commerce in order to make possible proper and efficient movement of that commerce. It was shown that by reason of the great increase in motive power and improvement in trackage, the employes of the railway company can go a greater distance in the same length of time than they could go under the old instrumentalities; that it is unnecessary to change crews on these interstate trains as often as under old conditions; that at division points, crews generally are changed, engines are overhauled and frequently changed; that all these things create delay

in transportation, and, therefore, the less division points the less delay on this account as to passengers and freight; that inasmuch as this particular railway runs its trains by continuous passage through many States of the Union, it is necessary to adjust its division points in each State to serve *through transportation*, and that this was a matter which required the judgment of experienced railroad men, familiar with the business of the road, familiar with its obligations to the public and familiar with the demands of the public.

It was shown that the division point at Sapulpa was established more than thirty years ago. At that time the Frisco Railroad was just entering the Indian Territory, and for many years Sapulpa was the end of the terminus of the line, and that for that reason it was natural and practical to establish a division point at Sapulpa, but that since then the population through which the railroad runs has vastly increased, and that the business interests of the country have very much expanded: that large cities have grown up on the line of the railroad: that Tulsa is now a city of more than 100,000 people, and only fourteen miles from Sapulpa, and that Oklahoma City, located on the line of said railway, is only about one hundred miles distant from Sapulpa; that the change in population, change in volume of the road's business, and the growth of cities—all these things have made it absolutely necessary, in the efficiency and economy of the service, to readjust division

points, to abandon some and acquire others, and that these changes in conditions now make it imperative that the railway company move its division points from Sapulpa, and that the holding of the division points and shops at Sapulpa will result in great loss annually to the railway company, which loss is stated in exact figures and terms.

In the examination of this statute it becomes necessary carefully to examine the subject matter of this legislation. It is not denied that in a proper case a State may pass a valid statute, affecting an instrumentality of interstate commerce, provided such instrumentality is not so necessary a part of interstate commerce and so intimately connected with the commerce itself as to be a part of that commerce. Of course, if the State statute touches directly interstate commerce, it falls, because whether Congress has acted or not, the State cannot regulate commerce as such, nor can it fetter or interfere with, in an unreasonable degree, that commerce, because a decided interference with interstate commerce by interfering with an instrumentality of commerce, is just the same as if the State had attempted, in express terms, to regulate that commerce. If the State statute acts upon commerce itself, it cannot stand. If it acts upon an instrumentality of commerce in such a way as to interfere directly with that commerce, the act still cannot stand.

From the statement of facts above mentioned, which

is conceded, we think, to be accurate in this case, division points must be selected with great care. They must be selected so as to co-ordinate and be in just accord with division points established in the other States through which the railroad runs. Division points and shops which are incidental thereto, are not like an engine or the track upon which the engine runs, but their relation to the commerce is more intimate, more comprehensive, and they are, indeed, it seems to us, an integral part of the commerce itself. We contend, therefore, that the subject matter of this legislation is so far a part of the commerce of the country, and so thoroughly enters into the life of that commerce and the discharge of the railway company's duty to the public, as to be beyond the power of the State to be considered as a proper subject of legislation, or regulation, or control. These division points and shops are more than mere naked instrumentalities of commerce, and any interference by the State or any power given to a State agency to interfere with the location of division points or shops, must be a direct interference with the interstate commerce of the railway company, and this apart from another vital question in this case, which we shall discuss later, that the State cannot operate a railroad against the consent of the railroad; that a railroad is private property, and the railroad company must, in the very essence of things, be left to manage its own property for the best interest of the public and the stockholders.

We now beg to cite some of the adjudications of this Court upon these questions. We shall make the citations as brief as possible, placing these cases in juxta-position in order to show the different utterances of the Court, and to find, if we can, from these decisions an established rule which will solve the question now under consideration.

In *Hannibal & St. Joseph Railroad Co.* v. *Husen*, 95 U. S. 465, 24 L. ed. 527, fifty years ago Mr. Justice Strong, speaking for the Court, said:

> "It may not (meaning the State) under the cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce. Upon this subject the cases in 92 U. S., to which we have referred, are very instructive. In *Henderson* v. *Mayor, etc.*, the statute of New York was defended as a police regulation to protect the State against the influx of foreign paupers; but it was held to be unconstitutional, because its practical result was to impose a burden upon all passengers from foreign countries. And it was laid down that, 'In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect.' * * * These cases, it is true, speak only of laws affecting the entrance of persons into a State; but the constitutional doctrine they maintain are equally applicable to interstate transportation of property. They deny validity to any State legislation professing to be an exercise of police power for protection against evils from abroad, which is beyond the necessity for its exercise wherever it interferes with the rights and powers of the Federal Government."

Again in the latter part of the opinion Mr. Justice Strong uses this language:

"Referring the statutes as mere police regulations, intended to protect domestic cattle against infectious disease, those courts have refused to inquire whether the prohibition did not extend beyond the danger to be apprehended, and whether, therefore, the statutes were not something more than exertions of police power. That inquiry, they have said, was for the Legislature and not for the courts. With this we cannot concur. The police power of a State cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise; and under color of it, objects not within its scope cannot be secured at the expense of the protection afforded by the Federal Constitution. And as its range sometimes comes very near to the field committed by the Constitution to Congress, it is the duty of the courts to guard vigilantly against any needless intrusion."

Testing the legislation now under consideration by these rules, has not the statute gone far beyond its apparent object, and far into the realm which is in the exclusive jurisdiction of Congress? That it interferes with the commerce of the road, no argument seems necessary, and that there was no reasonable ground for the exercise of this particular power by the Legislature equally appears.

In *Crutcher* v. *Commonwealth of Kentucky*, 141 U. S. 47, 35 L. ed. 649, Mr. Justice Bradley said:

"To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such

right, unless Congress should see fit to interpose some contrary regulation on the subject.

"It has frequently been laid down by this Court that the power of Congress over interstate commerce is as absolute as it is over foreign commerce."

Again, in the same opinion, he says:

"But the main argument in support of the decision of the Court of Appeals is that the act in question is essentially a regulation made in the fair exercise of the police power of the State. But it does not follow that everything which the Legislature of a State may deem essential for the good order of society and the well being of its citizens can be set up against the exclusive power of Congress to regulate the operations of foreign and interstate commerce."

In *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, 54 L. ed. 355, this language is used:

"But the disavowal by the State of any purpose to burden interstate commerce cannot conclude the question as to the fact of such a burden being imposed, or as to the unconstitutionality of the statute as shown by its necessary operation upon interstate commerce. If the statute, reasonably interpreted, either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may be both interstate and local business. This Court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms, but will look through forms to the substance of things. Such is an established rule of constitutional construction as the adjudged cases abundantly show."

Again, in *McNeill* v. *Southern Ry. Co.*, 202 U. S. 543, 50 L. ed. 1142, Mr. Justice White, speaking for the Court, said:

"Without at all questioning the right of the State of North Carolina, in the exercise of its police authority, to confer upon an administrative agency the power to make many reasonable regulations concerning the place, manner, and time of delivery of merchandise moving in the channels of interstate commerce, it is certain that any regulation of such subject made by the State, or under its authority, which directly burdens interstate commerce, is a regulation of such commerce, and repugnant to the Constitution of the United States. * * *

"The direct burden and resulting regulation of interstate commerce operated by an alleged assertion of State authority similar in character to the one here involved was passed upon by the Circuit Court of Appeals for the Sixth Circuit in *Central Stock Yards Co. v. Louisville & N. R. Co.*, 55 C. C. A. 63, 118 Fed. 113. The Court in that case was called upon to determine whether certain laws of Kentucky imposed a direct burden upon interstate commerce and were a regulation of such commerce, upon the assumption that those laws compelled a common carrier engaged in interstate commerce transportation to deliver cars of live stock, moving in the channels of interstate commerce, at a particular place beyond its own line, different from the general place of delivery established by the railway company. In pointing out that, if the legislation in question was entitled to the construction claimed for it, it would amount to a State regulation of interstate commerce, it was aptly and tersely said:

" 'It is thoroughly well settled that a State may not regulate interstate commerce, using the terms in the sense of intercourse and the interchange of traffic between the States. In the case at bar we think the relief sought pertains to the transportation and delivery of interstate freight. It is not the means of making a physical connection with other railroads that is aimed at, but it is sought to compel the cars and frieght received from one State to be delivered to another at a

particular place and in a particular way. If the Kentucky Constitution could be given any such construction, it would follow it could regulate interstate commerce. This it cannot do.' "

In the same case Mr. Justice White said:

"Viewing the order which is under consideration in this case as an assertion by the Corporation Commission of its general power to direct carriers engaged in interstate commerce to deliver all cars containing such commerce beyond their right-of-way and to a private siding, the order manifestly imposed a burden so direct and so onerous as to leave no room for question that it was a regulation of interstate commerce. On the other hand, treating the order as but the assertion of the power of the Corporation Commission to so direct in a particular case, in favor of a given person or corporation, the order not only was, in its nature, a direct burden and regulation of interstate commerce, but also asserted a power concerning a subject directly covered by the Act of Congress to regulate commerce and the amendments to that act, which forbid and provide remedies to prevent unjust discriminations and the subjecting to undue disadvantages by carriers engaged in interstate commerce."

In *Michigan Public Utilities Commission et al.* v. *Duke*, 266 U. S. 570, 69 L. ed. 445, the United States Supreme Court had to deal with what is known as Act 209 of the Public Acts of the State of Michigan, which imposed certain penalties upon plaintiff, who, under contracts with certain business firms, was transporting automobile bodies from Detroit, Michigan, to Toledo, Ohio. The act attempted to be enforced against the plaintiff provided that those similarly engaged in said State should furnish an indemnity

bond conditioned upon the payment of all just claims and liabilities resulting from injuries to persons, property, etc., by reason of such business. The Supreme Court in that case said:

> "A State has no power to fetter the right to carry on interstate commerce within its borders by the imposition of conditions or regulations which are unnecessary and pass beyond the bounds of what is reasonable and suitable for the proper exercise of its powers in the field that belongs to it."

In the case of *Lawton* v. *Steele*, 152 U. S. 133, 38 L. ed. 385, Mr. Justice Brown said:

> "To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The Legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

We beg at this point to quote the language of the Supreme Court in an opinion delivered on the 15th of October, 1928, in the case of *Foster-Fountain Packing Co. et al.* v. *E. J. Haydel et al.*, but not yet reported:

> "One challenging the validity of a State enactment on the ground that it is repugnant to the commerce clause is not necessarily bound by the legislative de-

clarations of purpose. It is open to him to show that in their practical operation its provisions directly burden or destroy interstate commerce. *Minnesota* v. *Barber*, 136 U. S. 313, 319. *Brimmer* v. *Rebman*, 138 U. S. 78, 81. In determining what is interstate commerce, courts look to practical considerations and the established course of business. * * * Interstate commerce includes more than transportation; it embraces all the component parts of commercial intercourse among States. And a State statute, that operates directly to burden any of its essential elements is invalid. * * * A State is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the State."

A careful application of the rules laid down in these various cases to determine whether or not a State statute, such as the one now under consideration, is valid, will discover, we think, that the statute under consideration is unique and extraordinary, both in the character of language used and the undisclosed purpose for which it was enacted. It is settled by the decisions above quoted that, in order to make this statute a valid exercise of police power, it *must be necessary;* it must be passed to serve some definite *public purpose* within State police power; it must not be arbitrary; must not seriously interfere with the management of private business, and it must not trench, in any way, upon the commerce power of Congress. We say, with great respect, that this statute is wholly unnecessary; that it does not serve any great public purpose; that it does not serve the public in its relation to railway com-

panies; that it does not serve the employe in his relation to railway companies; that it does not serve the shipper or the passenger, but can only, in its necessary operation as a practical piece of legislation, serve to benefit the inhabitants of a particular place, who have perhaps expended money and erected property on the faith of the location of a division point or shops at a particular place; that it is an attempt to interfere with the business of the railway company; that it is an attempt to regulate certain portions of that business which enter into the obligations of interstate railway companies to the public; that it is a subject matter, in its very nature, with which the State has no right to deal; and the above cases further emphasize the propostition that any act of a State Legislature which *interferes in a pronounced degree with interstate commerce*, is, in effect, a regulation of that commerce; that any State statute which fetters interstate commerce or which, in its necessary operation, fetters that commerce, is an invalid exercise of State power. A direct burden on interstate commerce or an unwarranted interference with interstate commerce, created and committed by a State, is *the equivalent of a regulation* of commerce which is exclusively within the domain of Federal power. We cannot see how a judicial mind, seeking rational conclusions from established facts, can reach a conclusion that this particular statute does not interfere seriously with interstate commerce; that it does not burden interstate com-

merce, and, therefore, that it is not a regulation of interstate commerce.

Cases distinctly analogous to the case at bar have been considered by this Court, and we beg now to cite some of those cases.

In *Mississippi R. Commission* v. *Illinois Central R. Co.*, 203 U. S. 335, 51 L. ed. 209, this Court was considering the validity of an order of the Mississippi Railroad Commission requiring a railway company to stop its interstate mail trains at a specified county seat where proper and adequate facilities were otherwise afforded that station, and speaking through Mr. Justice Peckham, said:

> "The order cannot be viewed alone in the light of ordering a stop at one place only, which might require not more than three minutes, as asserted. It is the question whether these trains can be stopped at all at any particular station when proper and adequate facilities are otherwise afforded such train station. If the Commission can order such a train to be stopped at a particular locality under such circumstances, then it could do so as to other localities, and in that way the usefulness of a through train would be ruined and the train turned from a through to a local one in Mississippi. The Legislature of a State could not itself make such an order, and it cannot delegate the power to a Commission to do so, in its discretion, when adequate facilities are otherwise furnished.
>
> "The transportation of passengers on interstate trains as rapidly as can with safety be done is the inexorable demand of the public who use such trains. Competition between great trunk lines is fierce and at times bitter. Each line must do its best even to

obtain its fair share of the transportation between States, both of passengers and freight. A wholly unnecessary, even though a small, obstacle ought not in fairness to be placed in the way of an interstate road, which may thus be unable to meet the competition of its rivals."

Why, may we ask, was the statute there held invalid? It was because, in its necessary operation and application, it interfered with interstate commerce; it interfered with the time to be made by the railway company; it interfered with the quick delivery of passengers and freight to given points on that interstate railroad; it prevented the railroad from meetin the competition of its rivals, and such a provision was wholly unnecessary if local facilities were furnished. If there is no power on the part of a State to require an interstate train, carrying the United States mail, to stop at a given point because of an unnecessary burden upon interstate commerce, how much less warrant there seems to be for the State to assume to determine where a railway company shall place its division points and its shops. It seems to us that the interference by a State with the time to be made by an interstate train is very much less in gravity and scope than the interference of a State with the establishment by a railway company of division points and shops.

In *Southern Railway Co.* v. *King*, 217 U. S. 524, 54 L. ed. 878, which involved a statute regulating the approach of interstate trains to dangerous crossing, signals to be given, etc., Mr. Justice Day said:

"It is consistent with the former decisions of this Court, and with a proper interpretation of constitutional rights, at least, in the absence of congressional action upon the same subject matter, for the State to regulate the manner in which interstate trains shall approach dangerous crossings, the signals which shall be given, and the control of the train which shall be required under such circumstances. Crossings may be so situated in reference to cuts or curves as to render them highly dangerous to those using the public highways. They may be in or near towns or cities, so that to approach them at a high rate of speed would be attended with great danger to life or limb. On the other hand, highway crossings may be so numerous and so near together that to require interstate trains to slacken speed indiscriminately at all such crossings would be practically destructive of the successful operation of such passenger trains. Statutes which require the speed of such train to be checked at all crossings so situated might not only be a regulation, but also a direct burden upon interstate commerce, and, therefore, beyond the power of the State to enact."

The constitutionality of this particular statute was sustained, but the observation of Mr. Justice Day above quoted shows that this statute went to the very limit of police power; that such unusual and necessary requirement with reference to the speed of trains would be a direct burden upon interstate commerce.

Mr. Justice Holmes and Mr. Justice White dissented in that case. Mr. Justice Holmes used this language on page 874:

"It seems to me a miscarriage of justice to sustain liability under a statute which possibly, and I think

probably, is unconstitutional, until the facts have been heard which the petitioner alleged and offered to prove. I think that the judgment should be reversed."

Again, in *Illinois Central R. Co.* v. *People of Illinois*, 163 U. S. 142, 41 L. ed. 107, it is said:

> "A State statute requiring a fast mail train carrying interstate passengers and the United States mail over an interstate highway established by authority of Congress, to delay the transportation of such passengers and mails by turning aside from the direct interstate route, and running to a station three and one-half miles away from a point on that route and back again to the same point, because such station is the county seat, for the interstate travel to and from which the railroad company furnishes other and ample accomodation, is an unconstitutional interference with and obstruction of interstate commerce and of the passage of the mails."

We respectfully submit, therefore, that the difference between an effort on the part of the State Legislature to stop interstate trains at given points differs not in principle, but only in degree, from its asserted power to authorize a state agency to determine whether a railway company shall move its division point or shops, the latter power asserted being much more direct in its movement against the commerce power of the National Government than the former. If the Legislature has the power to confer by statute upon a Corporation Commission the right to pass upon whether a railway company shall move its division point or shops, it would follow that it would have the same power to confer upon the Commission the power to say at

what point the railway company shall originally establish its division point or shops, thus taking away from the railway company, undoubtedly, the power best to manage and conduct its business in behalf of the public and its stockholders.

In each of these latter cases Your Honors will take notice that if proper local facilities were furnished by the railway company, the argument was at an end. In this case it is shown by affidavits that proper facilities for serving the shipping and traveling public, for serving the patrons of the road, and for serving the people of Sapulpa, as patrons of the road, will be left after the division points and shops are moved. If service in the furnishing of facilities by a railway company at the points where the Legislature seeks to stop interstate trains, is the answer to any attempted exercise of such power by the State, then certainly if reasonable facilities for service are left by a railway company at a place from which it desires to remove its division point and shops, the lack of power on the part of the Legislature to touch this question at all is equally apparent. It is not questioned in this case that the removal of the shops and division point from Sapulpa will still leave ample railroad facilities to fulfill every duty which the railway company owes to anybody at that particular place, and the remark of Mr. Justice McReynolds in *St. Louis & San Francisco Ry. Co.* v. *Public Service Commission of Missouri*, 254 U.

S. 535, 65 L. ed. 389, becomes of importance in considering this view of the subject. The learned Justice said:

> "The fact of local facilities this Court may determine, such fact being necessarily involved in the determination of the federal question whether an order concerning an interstate train does or does not directly regulate interstate commerce by imposing an arbitrary requirement."

We contend that, as a matter of common knowledge, division points and shops have nothing to do with local facilities to be furnished by a railway company at a given point on its line, and that even if we are wrong in this, and the court cannot deduce from the language of this statute that it has nothing to do with local facilities, yet the undisputed facts in this case are that sufficient local facilities will be left if said division point and shops are moved.

We have endeavored to demonstrate to the Court that this state statute, for all the reasons above asserted, cannot stand. It seems to us that its invalidity is apparent when it is measured and judged by the adjudications of this Court. Finally we say, with reference to the face of this statute, that it does not disclose any purpose which is within the purview of the police power of the State; that it arbitrarily and unjustly enters a field which is prohibited by the commerce clause of the Constitution of the United States; that it has given the power to the Corporation Commission to *operate* the business of the railway companies. We have searched diligently the statutes and de-

cisions of other States and we have found no counterpart to the state statute now under consideration. It seems that all the other sovereign States of this Union have been willing for railway companies to choose their own division points and locations for their machine and repair shops. The only State that has, by statute, touched it at all, so far as we can find, is the State of Texas, and inasmuch as a decision of this Court construing that statute is much relied upon by the appellants in this cause, we beg now to consider the Texas statute and the decision of this Court with reference to the same, and we feel that we can make no better or more lucid examination of that case, and the other cases cited by appellants to sustain their contention, than by quoting from the opinion of Judge Van Valkenburgh, one of the three Judges who sat in this case, found beginning on page 101 of the transcript:

> "We proceed to a consideration of the merits of the controversy.
>
> "*Western & Atlantic Railroad* v. *Georgia Public Service Commission et al.*, 267 U. S. 493, had to do with a bill to enjoin a state commission from enforcing an order requiring the plaintiff railroad to maintain service on an industrial switch track. Intrastate switching service was involved. It was held that under Section 402 a railroad company could not appeal from an order of a state commission requiring it to continue switching service on the ground of discrimination until it had invoked the investigation and decision of the Interstate Commerce Commission on this point. Also, the power to order its establishment or abandonment of such side tracks, though employed largely for its

interstate commerce, is not with the Interstate Commerce Commission, but with the States. Under the act the Federal Commission cannot order abandonment of service exclusively intrastate. (*State of Texas* v. *Eastern Texas Railroad Company et al.*, 258 U. S. 204.) This case, therefore, has no application to the point now under consideration.

"*Henderson Water Co.* v. *Corporation Commission of North Carolina et al.*, 269 U. S. 278, was an appeal under Section 266 of the Judicial Code from an order refusing temporarily to enjoin the enforcement, as confiscatory, of rates established by the Commission until the period of test prescribed in the order had expired. The Commission had allowed a partial increase and reserved to the water company the right to apply for further relief at the end of a test period. It was held that the company must exhaust its remedy with the Commission before suing in the district court. This case announces a principle frequently laid down in rate cases, and has no bearing upon the issue now before us.

"*International & Great Northern Railway Co. et al.* v. *Anderson County et al.*, 246 U. S. 424, was decided upon the facts peculiar to that case. It was held that foreclosure and sale of a railroad in a Federal Court will not relieve the purchaser from a contractual or statutory duty which rested on its predecessors under state law, to maintain offices and shops at a particular place. There the petitioning railroad was organized under the laws of State of Texas, and was, therefore, a Texas corporation. The Office-Shops Act of Texas, containing a prohibition against removal of offices and shops located by contract within a county in consideration of county bond aid, was in effect at the time the railway company took out its charter under general laws that expressly subject it to the limitations imposed by existing law. It was made a condition of incorporation that this restriction should be accepted.

The decision was expressly based upon the special facts there appearing. The Court said:

" 'We are not prepared to say that in this instance the State has transcended its powers.'

"The case of *Texas & Pacific Railway Company* v. *Marshall*, 136 U. S. 393, more nearly applies to the case under consideration. In that case it appears that:

" 'The City of Marshall agreed to give to the Texas & Pacific Railway $300,000 in county bonds, and 66 acres of land within the city limits for shops and depots; and the company "in consideration of the donation" agreed "to permanently establish its eastern terminus and Texas offices at the City of Marshall," and "to establish and construct at said city the main machine shops and car works of said railway company." The city performed its agreements, and the company, on its part, made Marshall its eastern terminus, and built depots and shops, and established its principal offices there. After the expiration of a few years, Marshall ceased to be the eastern terminus of the road, and some of the shops were removed. The city filed this bill in equity to enforce the agreement, both as to the terminus and as to the shops; *held*:

" '(1) That the contract on the part of the railway company was satisfied and performed when the company had established and kept a depot and offices at Marshall, and had set in operation car works and machine shops there, and had kept them going for eight years and until the interests of the railway company and of the public demanded the removal of some or all of these subjects of the contract to some other place.

" '(2) That the word "permanent" in the contract was to be construed with reference to the subject-matter of the contract, and that, under the circumstances of this case it was complied with by the establishment of the terminus and the offices and shops contracted for, with no intention at the time of removing or abandoning them.

"'(3) That if the contract were to be interpreted as one to forever maintain the eastern terminus, and the shops and Texas offices at Marshall, without regard to the convenience of the public, it would become a contract that could not be enforced in equity.

"'(4) That the remedy of the city for the breach, if there was a breach, was at law.'

"The rule announced in this case has never been modified nor impaired. It is cited with approval in *Armour & Co. et al.* v. *City of Dallas et al.*, 255 U. S. 280. To us it seems inconceivable that the managerial control of an interstate railway over the location of its shops and division points, for the purpose of co-ordinating its facilities in the discharge of its interstate commerce business, should be made subject to the control of the individual States acting in the interest of local communities and to the disadvantage of public convenience generally. It has been consistently held that interstate rates cannot be made the subject of private contract. *New York, New Haven & Hartford R. R. Co.* v. *Interstate Commerce Commission*, 200 U. S. 361; *Armour Packing Co.* v. *United States*, 209 U. S. 56.

"The same principle, in our judgment, applies generally to all essential instrumentalities of interstate commerce.

"As said by the Supreme Court, in the instant case, the federal power is paramount. Upon the undisputed allegations of the bills, with the attending presumptions the removal of these shops and this division point is demanded in the interest of economy in operation and improved service to the shipping and traveling public. The policy of the railway in this regard accords with the spirit of latest progressive legislation for maintaining the efficiency and economical operation of an interstate commerce railway system which serves both the States and the Nation. (*Dayton-Goose Creek Ry. Co.* v. *United States*, 263 U. S. 456-485.) It

follows that the motion to dismiss will be overruled and that in conformity with the terms of this submission a decree will be entered in favor of complainant."

The facts in the present case which were pertinent to the inquiry as to the validity of the Oklahoma statute, show clearly that the Oklahoma statute seriously interferes with the interstate commerce of the Frisco Railway Company. The facts in the case show that this statute, most probably, was passed to meet conditions at Sapulpa. It appears to us to be an unreasonable statute; an arbitrary statute; a discrimininting statute, and that it cannot stand the test of critical judicial review. If railway companies doing interstate business are required by Federal law to run their railroads economically and to the best interest of the public, and if they are required, under the general law, to conduct said railroads to the best interest of the public, then to such railway companies must be committed the exercise of judgment and discretion in adopting the proper methods to bring about such results. If the States are permitted to take charge of railway companies by requiring such companies to operate through narrow, restrictive, unnecessary and unreasonable regulations, the usefulness of such railroads, as great agencies of commerce, will be impaired and, sooner or later, destroyed.

II.

The Oklahoma Statute now under consideration is unconstitutional and void because it is an arbitrary and unreasonable exercise of the police power, and this vice appears on the face of the statute.

The police power of the various States of this Union, the manner of its exercise, and the limitation of its exercise, have been the subject of consideration by this Court from the beginning of the government. No precise definition of what is designated as police power has ever been attempted by any court, and whether there has been a proper and lawful exercise of such police power depends always upon the facts and conditions of the particular case under consideration. Whatever may be the origin and source of the police power of any sovereignty, and especially of the States of this Union, it has been distinctly pronounced in practically every State in the Union, by the lower Federal Courts, and by this Court, that its exercise must be reasonable; that it must not be arbitrary, and that it must have some reasonable relation to the class of subjects included in the police power. The authorities upon this subject have been collated with great care in Sections Nos. 227 and 228 of the 6th volume of Ruling Case Law, and to save time and necessity of quoting at length the cases there cited, we beg leave to quote in full the text. Beginning with the fourth line of Section 227, the text is as follows:

"The law must tend, in a degree that is perceptible

and clear, toward the preservation of the public welfare, or toward the prevention of some offense or manifest evil, or to the furtherance of some object within the scope of the police power. The mere assertion by the Legislature that a statute relates to the public health, safety or welfare does not in itself bring that statute within the police power of a State; for there must be obvious and real connection between the actual provisions of a police regulation and its avowed purpose, and the regulation adopted must be reasonably adapted to accomplish the end sought to be attained. One application of the familiar rule that the validity of an act is to be determined by its practical operation and effect and not by its title or declared purpose is that a constitutional right cannot be abridged by legislation under the guise of police regulation; since the Legislature has no power, under the guise of police regulations, to invade arbitrarily the personal rights and personal liberty of the individual citizen, or arbitrarily to interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations, or to invade property rights."

Again in Section 228, commencing near the top of the page, this language is used:

"All statutory restrictions of the use of property are imposed upon the theory that they are necessary for the safety, health, or comfort of the public. Accordingly if a restriction or regulation is without reason or necessity it cannot be enforced."

To sustain these different propositions cited in the text above quoted, cases from nearly every State in the Union have been cited, and a close examination of those cases by the writers of this brief, has convinced them that the cases are carefully digested.

We pause here to call attention to and quote from cer-

tain leading cases decided by this Court which laid down the rule with even greater clearness and conciseness than the opinions from the State courts. We call attention to the case of *Lochner* v. *New York*, 198 U. S. 45, 49 L. Ed. 937, where Mr. Justice Peckham, speaking for the Court, used this language:

> "It must, of course, be conceded that there is a limit to the valid exercise of the police power by the State. There is no dispute concerning this general proposition. Otherwise the 14th Amendment would have no efficacy and the Legislatures of the States would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext—become another and delusive name for the supreme sovereignty of the State to be exercised free from constitutional restraint. This is not contended for. In every case that comes before this Court, therefore, where legislation of this character is concerned, and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty, or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family?
>
> "This is not a question of substituting the judgment of the Court for that of the Legislature. If the act be within the power of the State it is valid, although the judgment of the Court might be totally opposed to the enactment of such a law. But the question would still remain: Is it within the police power of the State? and that question must be answered by the Court."

We call attention to the case of *Lawton* v. *Steele*, 152 U. S. 133, 38 L. Ed. 385. This case is a leading case upon this subject, and has been cited time and again by this Court, and most frequently by the courts of the various States passing upon the limits of the police power. Near the bottom of page 388, Mr. Justice Brown who delivered the opinion of the Court, uses this language:

> "To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interest of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The Legislature may not, under the guise of protecting the public interest, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

In this same case Mr. Chief Justice Fuller, on page 391, said:

> "The police power rests upon necessity and the right of self-protection."

Again in *C., B. & Q. Ry.* v. *Illinois*, 200 U. S. 561, 50 L. Ed. 596, this Court speaking through Mr. Justice Harlan, used this language:

> "If the means employed have no real, substantial relation to public objects which government may legally accomplish—if they are arbitrary and unreasonable, beyond the necessities of the case, the judiciary will

disregard mere forms, and interfere for the protection of rights injuriously affected by such illegal action."

Again on page 610, Justice Harlan says:

"There are, unquestionably, limitations upon the exercise of the police power which cannot, under any circumstances, be ignored."

We call special attention to the language of Mr. Justice Brewer in his dissenting opinion in that cause, on page 612, not for the purpose of attempting to challenge or weaken the opinion of the majority in that cause, but to bring out, if possible, more clearly limitations upon the police power of the States. Commencing at the bottom of that page the learned Justice said:

"It seems to me the police power has become the refuge of every grievious wrong upon private property. Whenever any unjust burden is cast upon the owner of private property which cannot be supported under the power of eminent domain or that of taxation, it is referred to the police power. But no exercise of the police power can disregard the constitutional guaranties in respect to the taking of private property, due process, and equal protection, nor should it override the demands of natural justice."

We have quoted at some length from these opinions which are, of course, familiar in every detail to this Court, but which we are compelled to present in order, if possible, to sustain the merit and justice of our contention. We say, therefore, that this statute now under consideration is an arbitrary, unnecessary and capricious exercise of legislative power. To what known and conceded source of the

police power can this statute be traced? What public purpose within the purview of the police power is sought to be established and enforced by this statute? It cannot be referred to the police power as to health, because the health either of the employes of a railroad or the public at large cannot be involved in the naked question as to whether or not the railway company ought to move its division points or shops. It cannot be placed upon the morals or the safety, or the public welfare, because the question as to whether division points or shops shall be moved does not, and cannot involve, it seems to us, either the question of morals, safety, or public welfare. The truth is, on the very face of things, the location of division points or of shops, is a matter touching the conduct of a railroad's business, and must be confided to the business judgment of such railroad.

Recurring to the language of the adjudications above cited, does this statute, by its terms, tend, in a degree that is perceptible and clear, toward the preservation of the public welfare? Is it designed to accomplish a purpose properly falling within the scope of the police power? Does it not, on its face, show an arbitrary interference with the right of a railroad company to operate and control its own business? Does it, anywhere, show, on its face, from the most liberal construction, that it was enacted for the safety, health, comfort or welfare of the public? Does it not, on its face, show that it is a restriction or regulation without reason or necessity? We, therefore, respect-

fully submit that this statute under consideration is arbitrary, unreasonable, unnecessary for the promotion of public good or for the protection of public right; that it is an unjustified interference with the right of a railway company so to conduct and manage its property as to best serve the public. If this be true, then such statute is unconstitutional as an unauthorized exercise of police power, and the learned gentlemen who oppose us in this case have attempted to justify this statute solely as a lawful exercise of police power by the State.

III.

This Oklahoma Statute is a denial of due process of law and equal protection of the law under the Fourteenth Amendment to the Constitution of the United States.

We believe it is thoroughly settled that a corporation is within the protective terms of said amendment as to due process and equal protection. This being so, this railway company here and now contends that this statute unjustly discriminates between this railroad and other railroads in exactly the same position and engaged in exactly the same business; that a classification has been made which is unlawful, and which violates the Constitution of the United States.

Again we call attention to the substance of the statute. It declares that wherever division points and shops of any

particular railroad have been located at a certain place for as much as five years, such railway company cannot move such division points or shops without the consent of the Corporation Commission, thereby leaving all railway companies, whose division points and shops have been located at a particular point for less than five years, free and unrestrained to move without the consent of the Corporation Commission, and to any place they see fit. We realize as to whether the question of classification in a given case is violative of the equal protection of the laws is a difficult one, and has been the source of much debate and consideration by this Court, but the general rule which determines such question has been very clearly stated by this Court in numerous decisions. We quote from the case of *Soon Hing* v. *Crowley*, 113 U. S. 703, 28 L. ed. 1145, where Mr. Justice Field, speaking for the Court, said:

> "The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the laws."

We beg to cite the case of *State of Iowa* v. *Garbroski*, 111 Iowa 496, and found in 56 L. R. A. 570, with notes, where Justice Ladd, in delivering the opinion of the Court, renders a lengthy and very learned opinion, citing cases from other States and from this Honorable Court to sus-

tain it. On page 571 of the case in 56 L. R. A., the Iowa Reports not being accessible to us, that Court said:

"The extent to which division may be carried without running into special, or what is known as 'class' legislation, is sometimes difficult to determine. All the authorities agree that the distinction in dividing may not be arbitrary, and must be based on differences which are apparent and reasonable. Thus, the Supreme Court of Minnesota, in *Nichols* v. *Walter,* 37 Minn. 264, 33 N. W. 800, declared: 'The true, practical limitation of the legislative power to classify is that the classification shall be upon some apparent natural reason—some reason suggested by necessity; by such a difference in the situation and circumstances of the subjects placed in different classes as suggests the necessity or propriety of different legislation with respect to them.' This was approved in *Lavallee* v. *St. Paul, M. & M. R. Co.,* 40 Minn. 249, 41 N. W. 974. In *Johnson* v. *St. Paul & D. R. Co.,* 43 Minn. 222, 8 L. R. A. 419, 45 N. W. 157, the same Court, through Mitchell, J., said: 'It has been sometimes loosely stated that special legislation is not class, "if all persons brought under its influence are treated alike under the same conditions." But this is only half the truth. Not only must it treat alike, under the same conditions, all who are brought "within its influence," but in its classification it must bring within its influence all who are under the same conditions.' In *State ex rel Richards* v. *Hammer,* 42 N. J. L. 439, the Supreme Court of New Jersey held that 'the true principle requires something more than a mere designation by such characteristics as will serve to classify, for the characteristics which thus serve as the basis of classification must be of such a nature as to mark the objects so designated as peculiarly requiring exclusive legislation. There must be substantial distinction, having a reference to the subject-matter of the proposed legislation, between the objects or places embraced in such legislation and the objects or places excluded. The marks of distinction

on which the classification is founded must be such, in the nature of things, as will in some reasonable degree, at least, account for or justify the restriction of the legislation.' The Supreme Court of Tennessee, in *Sutton* v. *State,* 96 Tenn. 696, 33 L. R. A. 589, 36 S. W. 697, very tersely states the law to be that legislation, to be constitutional and valid, 'must possess each of two indispensable qualities: First, it must be so framed as to extend to and embrace equally all persons who are or may be in the like situation and circumstances; and, secondly, the classification must be natural and reasonable, nor arbitrary and capricious.' "

The Court then cites numerous cases, and after giving such citations, continues:

"In the last case (being the case of *Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S. 283, 42 L. ed. 1037) Justice McKenna, speaking of the equal protection of the laws required by the Fourteenth Amendment to the Constitution of the United States, said: 'It does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privileges conferred and the liabilities imposed.' The same Court, speaking through Justice Brewer, in *Gulf, C. & S. F. R. Co.* v. *Ellis,* 165 U. S. 150, 41 L. ed. 666, declared that 'the differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations.' "

In this opinion by Mr. Justice Ladd, he was considering a statute of Iowa which exempted all persons who had served in the Union Army or Navy from the provisions requiring all persons peddling goods outside of a city or

town to pay a license tax. As to this classification, the learned Judge said:

> "The classification here attempted rests solely on a past and completed transaction, having no relation to the particular legislation enacted. All citizens are divided into two classes—those who served in the Army and Navy thirty-five years ago, and all those who did not. True, as suggested, the veterans came from no particular class; but the trouble with this statute is that it attempts to make of them a class in legislation, in the operation of which there can be no substantial distinction between them and others."

In conclusion we call attention to the case of *Gulf, Colorado & Santa Fe Railroad Co.* v. *Ellis*, 165 U. S. 150, 41 L. ed. 666. Mr. Justice Brewer rendered the opinion of the Court in that case, and it is most certainly a powerful and illuminating examination of the question now under consideration. In the body of that opinion, Justice Brewer says:

> "No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government."

And later on, the learned Justice quotes with approval the language of Judge Black in *State* v. *Loomis*, 115 Mo. 307, which is as follows:

> "Classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences which would serve for a classification for some purposes furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation

> must be such as in the nature of things furnish a reasonable basis for separate laws and regulations. Thus, the Legislature may fix the age at which persons shall be deemed competent to contract for themselves, but no one will claim that competency to contract can be made to depend upon stature or color of the hair. Such a classification for such a purpose would be arbitrary and a piece of legislative despotism, and therefore not the law of the land."

We think it useless to cite further authorities as to the rule to be adopted in determining when unlawful classification has been made. In the State of Oklahoma there are many interstate railroads. Some of them older, and some younger than the others. The Legislature has, by arbitrary action, fixed a period of five years under this statute, separating these railroads, placing a burden by virtue of said arbitrary time of five years upon some of these railroads, and leaving the other class unaffected and untouched by said burden. As said by the Supreme Court of Minnesota in the case of *Johnson* v. *St. Paul & D. R. Co.,* 43 Minn. 222, quoted by Judge Ladd in the foregoing opinion:

> "Not only must it treat alike, under the same conditions, all who are brought 'within its influence,' but in its classification it must bring within its influence all who are under the same conditions."

All the railroads in Oklahoma do the same kind of business. They carry passengers and they carry freight, and yet if one of these railroads has established its division point and shops at a given place for a period of less than five years, it need not go to the Corporation Commis-

sion to get permission to move these division points, but if it so happens that an older railroad, which has more than five years ago established its division point and shops at a certain place, desires to move, it must get the consent of the Corporation Commission to do so. It seems to us that this is an unjust classification and put a burden upon some railroads that is not put upon others when all such railroads are engaged in identically the same business. However this may be, we feel that we are certainly right that this distinction or classification is purely arbitrary and not based on differences which are apparent and reasonable. It seems to us to be clear that there is not such a difference in the situation and circumstances of the subjects placed in different classes as suggests the necessity or propriety of different legislation with respect to them.

In this connection we desire to call the Court's attention to counsel's point to the effect that a State may legislate to protect the health of railroad employes, and they say that the act in question is a valid exercise of the State's police power by reason of the sanitary provision contained in said act. If the validity of the act in question is to depend solely upon the sanitary provision contained therein, then we say the act is discriminatory and void and creates a classification of the railroad employes in the State of Oklahoma so unreasonable and unjustified that it cannot be sustained. The State may legislate to protect the health of railroad employes, but it cannot unreasonably and arbi-

trarily classify the employes and then legislate to protect only those included within an unjustified and arbitrary classification. If the sanitary provision as contained in said act is depended upon for the validity of said act, then we have legislation that divides railroad shops and division points within the State into two arbitrary classes, towit: one class of shops and division points that have been located at given points for five years or more; another class of shops and division points that have been located at given points for less than five years. The act provides that all those shops and division points included within the first class cannot be removed until the places to which they are to be removed are declared, by the Corporation Commission, to be sanitary. All those included within the second class, however, may be removed at will without any supervision from the Corporation Commission. What relation has the period of five years with the effect that an unsanitary locality will have upon railroad employes? Would it not be just as injurious to the health of those employes engaged at shops which have been located at a place for less than five years to be moved into an unsanitary vicinity as it would be to those employes engaged at shops which have been located at a given point for more than five years? That such a classification is unjustified, capricious, arbitrary and discriminatory, it seems to us, is so clear as to make further argument along this line unnecessary.

We beg, before closing the argument on this, to call

special attention to the opinion of Mr. Justice Sutherland in the case of *Louisville Gas & Electric Co.* v. *Coleman*, rendered on April 30, 1928, but not yet reported. The opinion in that case, we think, fully sustains the position which we have taken in the argument above.

IV.

The next attack which we make upon this statute is that the Legislature selected an arbitrary point of time, and from that arbitrary point of time changed the rules of evidence, and by reason of such arbitrary point of time so selected, made and declared a prima facie case against removal by the railway company.

We do not contend, of course, that ordinarily any citizen has a vested right in the rules of evidence. These rules may be changed to meet given cases, and the conceded existence of one fact may, in proper cases, be made *prima facie* evidence of the existence of a main fact to be proved or determined, but this right of the Legislature is not arbitrary, and if the pretended exercise of the right appears clearly to be arbitrary, the legislation cannot stand the test. This doctrine is not new to the courts. This matter is considered and the principal cases dealing with the proposition are cited and quoted in the case of *People* v. *Mallan*, 222 N. Y. 456, 119 N. E. 102. In that case the Court declared that in the matter now under consideration the true rule is:

> "In the exercise of this power numerous statutes have been enacted providing that proof of one fact shall be *prima facie* evidence of the main fact in issue;

and where the inference is not purely arbitrary, and there is a rational relation between the two facts, and the accused is not deprived of a proper opportunity to submit all the facts bearing upon the issue, it has been held that such statutes do not violate the requirements of due process of law."

Attorneys for appellants in this cause make little discussion of this proposition, but content themselves with citing *James-Dickinson Farm Mortgage Co. et al.* v. *Harry*, decided by this Court January 10, 1927, and not officially reported. We submit that this latter case does not control the situation here. The statute considered in this last case was one to protect the people of the State against fraud, and this is one of the most ancient sources of the police power. It was contended in that case that the statute violated the due process clause of the Fourteenth Amendment, in providing that whenever the kind of promise appearing in that case has not been complied with by the party making it within a reasonable time, "it shall be presumed that it was falsely and fraudulently made, and the burden shall be on the party making it to show that it was made in good faith, but was prevented from complying therewith by the act of God, the public enemy, or by some equitable reason."

Here there was a clear rational relation between the failure to keep the promise and the fraud inhering in its making, which was the ultimate fact to be found. The learned Justice used this language:

"It is well settled that a State may consider proof

of one fact presumptive evidence of another, if there is a rational connection between them,"

and the learned Justice cited the case of *Hawes* v. *Georgia*, 258 U. S. 1, 66 L. ed. 431. In that case Mr. Justice McKenna used the following language, and by an application of this language to the case at bar we cannot escape the conclusion that this arbitrary presumption, raised in this statute by reason of a certain point of time, denies to certain railway companies the equal protection of the law under the Fourteenth Amendment:

> "In *Hawkins* v. *Bleakly*, 243 U. S. 210, 61 L. ed. 678, it is said: 'The establishment of presumptions, and of rules respecting the burden of proof, is clearly within the domain of the State Governments, and that a provision of this character, not unreasonable in itself and not conclusive of the rights of the party, does not constitute a denial of due process of law.'
>
> "Undoubtedly there must be a relation between the two facts. That is, if one may evidence the other, there must be connection between them—a requirement that reasoning insists on, and, necessarily, the law."

Again Justice McKenna in the same case says:

> "We agree, therefore, with the Supreme Court of the State, that the existence upon land of distilling apparatus, consisting of the still itself, boxes and barrels, has a natural relation to the fact that the occupant of the land has knowledge of the existence of such objects and their situation."

Testing this statute by these rules and observations laid down by Mr. Justice McKenna, can anyone say that there is a rational relation between five years' occupation and the right to remove? What has the period of occupa-

tion to do with this right to remove? By what course of reasoning can we say that five years flat raises a presumption against the right to remove, but four years, eleven months and twenty-nine days raises no such presumption? Why is not the point of time selected as a basis for changing the rules of evidence and fixing a presumption against removal, purely arbitrary and capricious? This Honorable Court and many of the Courts of the Union, as we shall show under another subject in a later portion of this brief, have held that although a railway company may make a contract to locate shops or division points perpetually at a given place, such contract is opposed to public policy. An injunction will not lie to prevent the railway company from moving such division points or shops, especially where the railway company has remained there for a reasonable length of time.

In the celebrated case of *Texas & Pacific Railway Co.* v. *Marshall,* 136 U. S. 393, 34 L. ed. 385, this Court, speaking through Mr. Justice Miller, said that six years was a reasonable time. This case and all cases of a kindred character, were based upon the salutary proposition that a railway company owes its highest duty to the public, and next to that, to its stockholders, and if ever the exigencies of the public require a change in division points and shops, all private claims and rights must yield to such exigencies. It would, therefore, seem to follow that the longer a railway company had occupied a given place with its division

points or shops, the more certain it would be that exigencies would arise which required a removal in the interest of the public. Therefore, the presumption, if any existed at all, would be in favor of removal rather than against it. Here the Legislature reversed the presumption of continued occupation and emphatically and arbitrarily declares that five years' occupancy raises a presumption against the right to remove, and makes a *prima facie* case in favor of the State. Mr. Justice McKenna said that the selection of one fact as *prima facie* proof of another, makes, necessarily, the selected fact evidence the existence of the other ultimate fact, and he says there must be some rational connection between them. He further says that the requirement that this rational relation must exist, is demanded by reason and, necessarily, by the law. The Legislature has declared when a railway company has established its division points or shops at any place for five years, that this five years bears a rational relation to the question as to whether removal shall be granted by the Corporation Commission. We say that there is no rational relation between them, and that it is a waste of the time of this Court to argue that five years' occupation by the railway company of a given place for shops and division points, has anything, even remotely, to do with the question as to whether or not, under all the circumstances of the case, a railway company has a right to remove such division points or shops.

We, therefore, respectfully submit to the Court with-

out extending this argument, that the arbitrary period of five years, as fixed by the Legislature in this statute, has no rational relation to the question as to whether or not the railway company shall be permitted to remove. Having no such rational relation, the statute must fall.

The four points which we have discussed in the foregoing argument, raise questions which are neither technical nor frivolous. There has never been a time or a case in the history of this Court when propositions like the foregoing have not received its most careful consideration, because, as said by Mr. Justice Brewer for this Court in the case cited above, no duty is more pressing upon this great Court of last resort than to see that the equal protection of the laws and due process of law shall be maintained throughout this Union. If a police regulation is arbitrary, oppressive or capricious, not traceable to any known source of police power for the public welfare in some way, it offends against the Constitution. If, in the exercise of the police power, the Legislature has made an artificial and unreasonable classification, thereby giving to some persons in one class rights and privileges not accorded to persons in the same class, such exercise of power offends against the Constitution. If the Legislature, in the pretended exercise of its police power, arbitrarily selects one fact as *prima facie* evidence of another fact, thereby changing the ordinary rules of evidence common to all citizens, such accepted fact must bear a rational relation to the fact to be proved,

and if it does not, this offends against the Constitution. It is not often that a State statute is open to all these objections. It is clear, from a consideration of this whole record, that this statute was passed hastily and without due consideration, and to meet conditions such as the Legislature thought existed at Sapulpa. The statute was passed while the Sapulpa litigation, before the Corporation Commission, was pending. Proof had been made at the hearing before the Commission by the inhabitants of Sapulpa, as shown by this record, that West Tulsa, the place to which the railway company desired to remove its shops from Sapulpa, was unsanitary, and it is fair to assume that this very litigation, and the facts there proved, influenced the passage of the statute now under consideration. It cannot be said that if the Legislature had in view when it passed such statute, the purpose of protecting the inhabitants of the particular town in question, who had built and acquired property with reference to the location of division points and shops, that this was a purpose justifying the exercise of the police power, because the inhabitants of a particular town cannot possibly have any vested right in the continued occupation of certain portions of the town by a railway company for shops or for the establishment of division points.

The Supreme Court of Oklahoma has frequently held that the increase or decrease in property value caused by change of location or abandonment of depots, yards, shops

and other facilities, are not matters which can be considered as affecting, in any way, the right to make such changes; that public convenience, sufficient accommodations and sufficient facilities, as those terms must be used with relation to the requirements of a public service corporation, mean conveniences, etc., *with relation to the business of a common carrier on the part of the railroad-using public.*

In *St. Louis, Iron Mountain & Southern Ry. Co.* v. *State*, 31 Okla. 509, 122 Pac. 217, Justice Dunn, speaking for the Court, said in the body of the opinion:

> "Railroad depots and their locations are public facilities for the use and convenience of the people having business to transact with the companies and the wishes of other people or the fact that they purchased property in reference to the location of the depot is absolutely of no consequence whatsoever in locating or relocating it. No property owner can acquire a vested right in the location of a depot, and as these considerations were the primary ones affecting the action of the Commission in this instance, and not being competent to be considered, they must be eliminated from the case, leaving alone what the Commission concedes should outweigh any others advanced."

Again in *Wharton* v. *Miller*, 33 Okla. 771, Mr. Justice Williams, now Federal Judge of the Eastern District of Oklahoma, speaking for the Oklahoma Court, said:

> "The fact that the construction and maintenance of the station at W. may have the consequential or incidental effect of building a town at that point and retarding the growth of adjacent towns at stations B. and M., and thereby causing the depreciation of prop-

> erty located in said towns, is not a sufficient legal reason for parties interested in property located in either B. or M. to complain at the parties residing at W. being afforded all reasonable facilities, conveniences and services as patrons of such public service corporation at said station."

Again in *Missouri, O. & G. Ry. Co.* v. *State*, 53 Okla. 341, 156 Pac. 1155, Chief Justice Kane, speaking for the Court, said:

> "The location of a railway station, of course, belongs to the public duties of the Commission, when the question is, whether its location at a certain point is for the benefit and interest of the traveling or railroad-using public. If, however, these considerations are ignored, or, if considered, are held to be subordinate, and other elements are considered as paramount, which are aside from either the public duty or the interest of the traveling or railroad-using public, or the necessities of the operation of the railroad, then an order made with the latter for a basis must be held to be unreasonable and without legal sanction."

And this we claim is the real "meat in the cocoanut." An inspection of this statute and the circumstances surrounding its passage discloses that the Legislature did not have in mind, when it enacted such statute, the question of service to the patrons of the railroad, the shipper and the traveler; that it did not have in mind the welfare of such people who had business with the railroad; that it did not have in mind the welfare of the employes of the railroad so far as the right to remove was concerned, but must have had in mind, in a large degree, the rights of the inhabitants of the town, in a property sense, which can never be taken

into consideration, as shown by the Oklahoma cases above cited, as a basis for denying removal of division points, etc.

Respectfully submitted,

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